UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4
Mx. North Gallery

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-appeal-cases_1922_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. Dickens, Esq., K.C.
Vice-Chairman—T. R. Hughes, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir E. M. Pollock, M.P.	Attorney-General.
Sir Leslie F. Scott, M.P.	Solicitor-General.

J. J. D. Botterell, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. Tomlin, Esq., K.C. W. R. Sheldon, Esq.	Lincoln's Inn.
H. F. Dickens, Esq., K.C. Sir Hugh Fraser.	Inner Temple.
A. Macmorran, Esq., K.C. Arthur Powell, Esq., K.C.	Middle Temple.
Edward Clayton, Esq., K.C. W. Greaves-Lord, Esq., K.C.	Gray's Inn.
T. R. Hughes, Esq., K.C., of Lincoln's Inn. E. W. Hansell, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks). Sir Walter Trower (Firm—Messrs. Trower, Still & Co.).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 30, Montague Street, W.C. 1.

1922.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C

REPORTERS.

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Privy Council	A. M. TALBOT,	*Barrister-at-Law.*

1922.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON,
W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

BIBL.
LONDIN
UNIV.

BIBL.
LONDIN.
UNIV.

ERRATA.

Page	*Line*	*For*	***Read***
317	Footnote (2)	2 Doug. 212n.	2 Doug. 612n.
371 373	1 5	Sir Charles Mathew, K.C.	Charles Mathew, K.C.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922, will be as follows:—

In the First Series,

[1922] 1 Ch. [1922] 2 Ch.

In the Second Series,

[1922] 1 K. B. [1922] 2 K. B. [1922] P.

In the Third Series,

[1922] 1 A. C. [1922] 2 A. C.

The Scottish Law Reports are cited as follows:

Shaw, or, First Series Court of Session Cases . .	by	S.
Dunlop, or, Second Series ,, ,, ,, . .	,,	D.
Macpherson, or, Third Series ,, ,, ,, . .	,,	M
Rettie, or, Fourth Series ,, ,, ,, . .	,,	R.
Fraser, or, Fifth Series ,, ,, ,, . .	,,	F.
New Series ,, ,, ,, . .	,,	1907 S. C.
Scottish Law Reporter ,, ,, ,, . .	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases .	,,	Mor. Dict.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
IN THIS VOLUME.

A.

PAGE

Addie & Sons' Collieries, Costello *v.* – – H. L. (Sc.) 164

Admiralty Commissioners *v.* Volute (Owners of S.S.) H. L. (E.) 129

Alleyn *v.* Barthe – – P. C. 215

Anchor Line (Henderson Brothers) *v.* Mohad – H. L. (Sc.) 146

Anichab (The) – – P. C. 235

Attorney-General for British Columbia, Mackay *v.* – P. C. 457

Attorney-General for Manitoba *v.* Kelly – – – P. C. 268

B.

PAGE

Baillie, Coltness Iron Co. *v.* H. L. (Sc.) 170

Barthe, Alleyn *v.* – – P. C. 215

Bennett, O'Meara *v.* – P. C. 80

Blackpool Corporation *v.* Starr Estate Co. – – H. L. (E.) 27

Blonde (The) – – – P. C. 313

Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919, In re – – P. C. 191

Bonded Warehouses (Egyptian) Co. *v.* Yeyasu Goshi Kaisha P. C. 111

PAGE
Boyce, Seguin *v.* – – P. C. 462
——— *v.* Wasbrough H. L. (E.) 425
Briggs, Sutters *v.* – H. L. (E.) 1
Burland *v.* The King – P. C. 215
Butt (Henry) & Co. *v.* Weston-super-Mare Urban Council H. L. (E.) 340

C.

Canada Cement Co. *v.* East Montreal (Town of) – P. C. 249
Cement (Canada) Co. *v.* East Montreal (Town of) – P. C. 249
Chuah Hooi Gnoh Neoh, Khaw Sim Tek *v.* – – – P. C. 120
Cimitian, Gout *v.* – – P. C. 105
Coltness Iron Co. *v.* Baillie H. L. (Sc.) 170
Combines and Fair Prices Act, 1919, and Board of Commerce Act, 1919, In re – – P. C. 191
Costello *v.* Addie & Sons' Collieries – – H. L. (Sc.) 164

E.

East Montreal (Town of), Canada Cement Co. *v.* – – P. C. 249
Egyptian Bonded Warehouses Co. *v.* Yeyasu Goshi Kaisha P. C. 111
Esquimalt and Nanaimo Ry. Co., Wilson *v.* – – P. C. 202

F.

Forbes *v.* Git – – – P. C. 256
French & Co. *v.* Leeston Shipping Co. – – H. L. (E.) 451

G.

Git, Forbes *v.* – – P. C. 256
Glasgow Corporation *v.* Taylor H. L. (Sc.) 44
Gopala Chetty *v.* Vijayaraghavachariar – – – P. C. 488

PAGE
Gout *v.* Cimitian – – P. C. 105
Great Western Ry. Co., Smith (H. C.), Ld. *v.* – H. L. (E.) 178
Greenwood *v.* Smidth & Co. H. L. (E.) 417

H.

Hameed *v.* Special Officer – P. C. 262
Haugland (Owners of S.S.) *v.* Karamea (Owners of S.S.) H. L. (E.) 68
Hurly, Murphy *v.* – H. L. (I.) 369

I.

Iron (Coltness) Co. *v.* Baillie H. L. (Sc.) 170

J.

Johannesburg Municipal Council, Madrassa Anjuman Islamia *v.* – – – P. C. 500

K.

Karamea (Owners of S.S.), Haugland (Owners of S.S.) *v.* H. L. (E.) 68
Kelly, Attorney-General for Manitoba *v.* – – P. C. 268
Khaw Sim Tek *v.* Chuah Hooi Gnoh Neoh – – P. C. 120

L.

Leeston Shipping Co., French & Co. *v.* – – H. L. (E.) 451

M.

McClintock, Union Bank of Australia *v.* – – P. C. 240
Mackay *v.* Attorney-General for British Columbia – P. C. 457

PAGE

Madrassa Anjuman Islamia *v.* Johannesburg Municipal Council – – – – P. C. 500
Mahomed Haneef, Oppenheim & Co. *v.* – – – P. C. 482
Minister of Finance, Royal Trust Co. *v.* – – – P. C. 87
Mohad, Anchor Line (Henderson Brothers) *v.* – H. L. (Sc.) 146
Murphy *v.* Hurly – H. L. (I.) 369

N.

New Sweden (The) – – P. C. 229
Nicolle *v.* Nicolle – – P. C. 284

O.

O'Meara *v.* Bennett – P. C. 80
Oppenheim & Co. *v.* Mahomed Haneef – – – P. C. 482

P.

Palgrave, Brown & Son *v.* Turid (Owners of S.S.) – H. L. (E.) 397
Pellworm (The) – – P. C. 292

R.

Rannveig (The) – – P. C. 97
Rex, Burland *v.* – – P. C. 215
Royal Trust Co. *v.* Minister of Finance – – – P. C. 87

S.

Seguin *v.* Boyce – – P. C. 462
Shipping (Leeston) Co., French & Co. *v.* – – H. L. (E.) 451
Smidth & Co., Greenwood *v.* H. L. (E.) 417

PAGE

Smith (H. C.), Ld. *v.* Great Western Ry. Co. – H. L. (E.) 178
Special Officer, Hameed *v.* P. C. 262
Starr Estate Co., Blackpool Corporation *v.* – – H. L. (E.) 27
Sutters *v.* Briggs – H. L. (E.) 1

T.

Taylor, Glasgow Corporation *v.* H. L. (Sc.) 44
Turid (Owners of S.S.), Palgrave, Brown & Son *v.* – H. L. (E.) 397

U.

Union Bank of Australia *v.* McClintock – – P. C. 240

V.

Vijayaraghavachariar, Gopala Chetty *v.* – – – P. C. 488
Volute (Owners of S.S.), Admiralty Commissioners *v.* H. L. (E.) 129

W.

Wasbrough, Boyce *v.* H. L. (E.) 425
Weston-super-Mare Urban Council, Butt (Henry) & Co. *v.* – – – H. L. (E.) 340
Wilson *v.* Esquimalt and Nanaimo Ry. Co. – – P. C. 202

Y.

Yeyasu Goshi Kaisha, Egyptian Bonded Warehouses Co. *v.* P. C. 111

TABLE OF CASES CITED.

A.

		PAGE
Abelman *v.* Lodenwijk	S. A. L. R. [1917] W. L. D. 123	501
Adams *v.* Great North of Scotland Railway Company	[1891] A. C. 31	281
Adela, The	6 Wall. 266	295
Akrokerri (Atlantic) Mines *v.* Economic Bank	[1904] 2 K. B. 465	7, 241
Aktieselkab Helios *v.* Ekman & Co.	[1897] 2 Q. B. 83	398
Ancona *v.* Marks	31 L. J. (Ex.) 163	7
Andalusian, The	2 P. D. 231	141
Anna, The	5 C. Rob. 373	295
Arden's Settlement, In re	[1890] W. N. 204	428
Ashrody *v.* S.S. City of Edinburgh	[1920] 1 K. B. 301	149
Attorney-General *v.* Great Northern Railway Company	[1916] 2 A. C. 356	343
—— *v.* Hertford (Marquis)	3 Ex. 670	106
—— *v.* Theobald	24 Q. B. D. 557	106
—— *v.* Wanduragola	5 Ceylon N. L. R. 98	263
Attorney-General for Alberta *v.* Attorney-General for Canada	[1915] A. C. 363	204
Attorney-General for British Columbia *v.* Canadian Pacific Railway Company	[1906] A. C. 204	204
Attorney-General for Quebec *v.* Reed	10 App. Cas. 141	223
Aveland (Lord) *v.* Lucas	5 C. P. D. 351	345

B.

Ball's Trusts, In re	11 Ch. D. 270	428
Balwant Rao *v.* Puran Mal	I. L. R. 6 All. 1	120
Bank of Toronto *v.* Lambe	12 App. Cas. 575	223
Barker *v.* Edger	[1898] A. C. 748	38
Barnardo's Homes *v.* Special Income Tax Commissioners	[1921] 2 A. C. 1	122
Barnsley British Co-operative Society *v.* Worsborough Urban Council	[1916] 1 A. C. 291	344
Beakbane *v.* Beakbane	Unreported	289
Bhugwandas Mitharam *v.* Rivett-Carnac	L. R. 26 I. A. 32	497
Billericay Rural Council *v.* Poplar Union	[1911] 2 K. B. 801; 80 L. J. (K. B.) 1241	343
Bindessuri Pershad Singh *v.* Jankee Pershad Singh	I. L. R. 16 C. 482	483
Blackstone *v.* Miller	188 U. S. 189	218
Blackwood *v.* The Queen	8 App. Cas. 82	218
Bond *v.* Taylor	2 J. & H. 473	428
Brenda Steamship Company *v.* Green	[1900] 1 Q. B. 518	399

PAGE

Brewers' and Maltsters' Association of Ontario *v.* Attorney-General for Ontario . . . [1897] A. C. 231 . . . 223
Brisebois *v.* Roxton Falls (Village of) . 4 Rév. de Jur. 26 . . . 251
British and Foreign Marine Insurance Company *v.* Gaunt . . . [1921] 2 A. C. 41 . . . 286
British Westinghouse Company *v.* Underground Electric Railways Company . . . [1912] A. C. 673 . . . 281
Bruce *v.* Steen . . . 14 L. R. Ir. 408 . . . 372
Brydone's Settlement, In re . . [1903] 2 Ch. 84 . . . 425
Buccleuch (Duke) *v.* Metropolitan Board of Works . . . L. R. 5 H. L. 418 . . . 270
Bywell Castle, The . . . 4 P. D. 219 . . . 136

C.

Cairnsmore, The . . . [1921] 1 A. C. 439 . . 232
Campbell *v.* Ord and Maddison . . 1 R. 149 . . . 47
Canadian Klondyke Mining Company *v.* Smith . . . Unreported. 16 Western L. R. 196; 19 Western L. R. 1 464, 478
Capital and Counties Bank *v.* Gordon . [1903] A. C. 240 . . 6, 241
Chellabhai Atmaram *v.* Nandubai . I. L. R. 20 B. 238 . . 484
Chile, The . . . [1914] P. 212 . . . 314
Churchward *v.* The Queen . . L. R. 1 Q. B. 173 . . . 457
Citizens Insurance Company *v.* Parsons 7 App. Cas. 96 . . . 192
Clark *v.* Chambers . . . 3 Q. B. D. 327 . . . 56
Clarke *v.* Colls. . . . 9 H. L. C. 601 . . . 427
Clayton *v.* Blakey . . . 8 T. R. 3; 2 Sm. L. C. 12th Ed. p. 118 . . . 465
Colquhoun *v.* Brooks . . . 14 App. Cas. 493 . . . 218
Commercial Cable Company *v.* Government of Newfoundland . . . [1916] 2 A. C. 610 . . 457
Conway's Case . . . 1911 S. C. 660 . . . 176
Cooke *v.* Freeman . . . 8 Ceylon N. L. R. 265 . . 263
—— *v.* Midland Great Western Railway Company of Ireland . . [1909] A. C. 229 . . . 44
Cooper *v.* Cooper . . . L. R. 7 H. L. 53 . . . 122
Corea Mudaliyar *v.* Punchirala . . 4 Ceylon N. L. R. 135 . . 263
Cork Steamship Company *v.* Kiddle . 2 Lloyd's List Rep. 505 . 130
Corsican Prince, The . . . [1916] P. 195 . . . 117
Cotton *v.* The King . . . [1914] A. C. 176 . . . 215
Crookston Brothers *v.* Furtodo . . 5 Tax Cas. 602; 48 S. L. R. 134 . . . 420
Crowhurst *v.* Amersham Burial Board . 4 Ex. 5 . . . 49
Cundy *v.* Lindsay . . . 3 App. Cas. 459 . . . 240
Curran *v.* Midland Great Western Railway Company of Ireland . . [1896] 2 I. R. 183 . . . 178

D.

Dadoo, Limited *v.* Krugersdorp Municipal Council . . . S. A. L. R. [1920] A. D. 530 . 501
Daimler Case . . . [1916] 2 A. C. 307 . . 502
Davidson *v.* Monkland Railways Company . . . 17 D. 1038 . . . 65

		PAGE
Davies *v.* Mann	10 M. & W. 546	139
Davis & Sons *v.* Taff Vale Railway Company	[1895] A. C. 542	31
Dawson *v.* Midland Railway Company	L. R. 8 Ex. 8	502
Dayal Jairaj *v.* Khatav Ladha	12 Bom. H. C. 97	496
Deane's Trusts, In re	[1900] 1 I. R. 332	429
Denton *v.* Peters	L. R. 5 Q. B. 475	7
Dey *v.* Mayo	[1920] 2 K. B. 346	2
Dickey *v.* Thibault	Q. R.13 S. C. 58	250
Dobson *v.* Groves	6 Q. B. 637	270
——— *v.* Horsley	[1915] 1 K. B. 634	390
Dowell *v.* General Steam Navigation Company	5 E. & B. 195	138
Dunster *v.* Hollis	[1918] 2 K. B. 795	390
Düsseldorf, The	[1920] A. C. 1034	293

E.

Edward and Mary, The	3 C. Rob. 305	296
Edwards *v.* Dick	4 B. & Al. 212	23
Emmins *v.* Bradford	13 Ch. D. 493	425
Erichsen *v.* Last	8 Q. B. D. 414	420
Esperanza, The	1 Hag. Adm. 85	295
Esquimalt and Nanaimo Railway Company *v.* Fiddick	14 B. C. Rep. 412	204
—— *v.* Granby Consolidated Mining Company	[1920] A. C. 358	204
—— *v.* Wilson	[1920] A. C. 358	204
Etherley Grange Coal Company *v.* Auckland District Highway Board	[1894] 1 Q. B. 37	344

F.

Farquharson & Co. *v.* King & Co.	[1902] A. C. 325	242
Fife Coal Company *v.* Sharp	[1921] 1 A. C. 329	164
Forbes, In re	[1899] W. N. 6	425
Fraser *v.* City of Frazerville	[1917] A. C. 187	270
Fuller *v.* Fenwick	3 C. B. 705	281
Furnivall *v.* Coombes	5 Man. & G. 736	259

G.

Geirionydd Rural Council *v.* Green	[1909] 2 K. B. 845	344
George Roper, The	8 P. D. 119 ; 5 Asp. M. L. C.134	141
Glasgow Navigation Company *v.* Howard	15 Com. Cas. 88	398
Golding *v.* Bradlaw	[1919] 2 K. B. 238	5
Grainger & Son *v.* Gough	[1895] 1 Q. B. 71 ; [1896] A. C. 325	420
Grand' Mère (Ville de) *v.* Balcer	Q. R. 45 S. C. 109	251
Grant *v.* Caledonian Railway Company	9 M. 258	65
Green & Co. and Balfour, Williamson & Co., In re	63 L. T. 325	270
Gutenfels, The	[1916] 2 A. C. 112	315

H.

		PAGE
Hambro *v.* Burnard	[1904] 2 K. B. 10	241
Hamlyn & Co. *v.* Talisker Distillery	[1894] A. C. 202	483
Hancock, In re	[1896] 2 Ch. 173	428
Harding *v.* Commissioners for Stamps for Queensland	[1898] A. C. 769	218
Hardman *v.* Maffett	13 L. R. Ir. 499	429
Harrold *v.* Watney	[1898] 2 Q. B. 320	57
Hart *v.* Rogers	[1916] 1 K. B. 646	390
Hartley *v.* Matson	32 Can. S. C. R. 644	465
Hastie *v.* Edinburgh Magistrates	1907 S. C. 1102	47
Haule *v.* Hemyng	Viner's Ab. Condition (A.d) pl. 15	393
Hawkins *v.* Gathercole	6 D. M. & G. 1	291
Hay *v.* Ayling	16 Q. B. 423	21
Hayton *v.* Irwin	5 C. P. D. 130	408
Helios, The	[1897] 2 Q. B. 83	413
Herbert *v.* Samuel Fox & Co.	[1916] 1 A. C. 405	174
Hero, The	[1912] A. C. 300	130
Heydon's Case	3 Rep. 7a	291, 502
Hill *v.* Thomas	[1893] 2 Q. B. 333	342
Hodgkinson *v.* Fernie	3 C. B. (N. S.) 189	283
Holgate *v.* Killick	7 H. & N. 418	281
Holman *v.* Wade	The Times, May 11, 1877	397
Home *v.* Camden (Earl)	2 H. Bl. 533	117
Horseman *v.* Abbey	1 Jac. & W. 381	428
Hugall *v.* M'Lean	53 L. T. 94; 33 W. R. 588	369, 382
Huggett *v.* Miers	[1908] 2 K. B. 278	390
Humfrey *v.* Dale	7 E. & B. 266; E. B. & E. 1004	398, 406
Hunter *v.* De Bothmer	Mor. Dict. 11,957	301
Hyams *v.* Stuart King	[1908] 2 K. B. 696	19

I.

Insurance Act Case	[1916] 1 A. C. 588	193

J.

Jewson *v.* Gatti	2 Times L. R. 381	56
John Deere Plow Company *v.* Wharton	[1915] A. C. 330	198
Johnson, In re	29 Ch. D. 964	122
——— *v.* The King	[1904] A. C. 817	458

K.

Kay *v.* Goodwin	6 Bing. 576	204
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	242
Keymer *v.* Visvanatham Reddi	L. R. 44 I. A. 6	482
Kherodomoney Dossee *v.* Durgomoney Dossee	I. L. R. 4 Cal. 435	122
King and Duveen, In re	[1913] 2 K. B. 32	282
Kirihami *v.* Appuhami	2 Sup. Ct. Cir. 88	263
Knox *v.* Gye	L. R. 5 H. L. 656	488
—— *v.* Symmonds	1 Ves. Jun. 369	282
Knight and Tabernacle Permanent Building Society, In re	[1892] 2 Q. B. 613	283

L.

		PAGE
Lachance *v.* St. Anne de Beaupré (Ville de)	Q. R. 10 K. B. 223	251
Lacy, In re	[1899] 2 Ch. 149	122
Lambe *v.* Manuel	[1903] A. C. 68	218
Latham *v.* R. Johnson and Nephew, Limited	[1913] 1 K. B. 398	47
Law *v.* Parnell	29 L. J. (C. P.) 17	7
Le Caux *v.* Eden	2 Doug. 594	116
Le Dain *v.* Messervy	Unreported	286
Ledbury Rural Council *v.* Somerset	84 L. J. (K. B.) 1297	343
Lee *v.* Zagury	8 Taunt. 114	242
Lindo *v.* Rodney	2 Doug. 612n.	236, 317
Lloyd *v.* Groer, Smith & Co.	[1912] A. C. 716	241
Local Government Board *v.* Arlidge	[1915] A. C. 120	202
Loekken, The	J. C. July 26, 1918	301
London & South Western Railway Company *v.* Flower	1 C. P. D. 77	371
Lovell & Collard's Contract, In re	[1907] 1 Ch. 249	106
Lucy *v.* Bawden	[1914] 2 K. B. 318	390
Luscombe *v.* Great Western Railway Company	L. R. 2 Q. B. 313	504
Lygo *v.* Newbold	9 Ex. 302	65
Lynch *v.* Nurdin	1 Q. B. 29	47
Lynn *v.* Bell	I. R. 10 C. L. 487	5

M.

McDermott *v.* S.S. Tintoretto	[1909] 2 K. B. 704; [1911] A. C. 35	149
McGregor *v.* Esquimalt & Nanaimo Railway Company	[1907] A. C. 462	206
M'Lean *v.* Clydesdale Banking Company	9 App. Cas. 95	6
Macpherson & Co. *v.* Moore	6 Tax Cas. 107; 49 S. L. R. 979	420
McRae & Co. *v.* Lemay	18 Can. S. C. R. 280	281
Mahony *v.* Waterford, Limerick and Western Railway Company	[1900] 2 I. R. 273	181
Makin *v.* Watkinson	L. R. 6 Ex. 25	371
Manchester Bonded Warehouse Company *v.* Carr	5 C. P. D. 507	382
Manchester, Sheffield, &c., Railway Company *v.* Wallis	14 C. B. 213	502
Mare, In re	[1902] 2 Ch. 112	428
Margaret, The	9 App. Cas. 873	136
——————	6 P. D. 76	137
Marie Leonhardt, The	[1921] P. 1	315
Melles & Co. *v.* Holme	[1918] 2 K. B. 100	371
Merwanji Hormusji *v.* Rustomji Burjorji	I. L. R. 6 B. 628	488
Miller *v.* Hancock	[1893] 2 Q. B. 177	390
——— *v.* Thomson	3 M. & G. 576	242
Monte Rosa, The	[1893] P. 23	137
Montreal City *v.* Brown	2 App. Cas. 168	251
—————— *v.* St. Denis Land Company	Q. R. 22 K. B. 238	251

		PAGE
Moore & Co. *v.* Donnelly	57 S. L. R. 380; [1921] 1 A. C. 329	166, 174, 175
Morison *v.* London County &c. Bank	[1914] 3 K. B. 356	242
Morris *v.* Howes	4 Hare, 599	428
Möwe, The	[1915] P. 1	316

N.

National Bank *v.* Silke	[1891] 1 Q. B. 435	18
National Telephone Company *v.* Postmaster-General	[1913] A. C. 546	252
Neilson *v.* London and North Western Railway Company	[1921] 3 K. B. 213	181
Nereide, The	9 Cranch, 388	318
Nicholls *v.* Evans	[1914] 1 K. B. 118	2
Nifa, The	[1892] P. 411	399
Northmoor Steamship Company *v.* Harland & Wolff	[1903] 2 I. R. 657	399
Noyes *v.* Cowansville (Village of)	8 Queb. Prac. R. 426	251

O.

Ogdens *v.* Nelson	[1904] 2 K. B. 410; [1905] A. C. 109	453
Oliver *v.* Jolin	Q. R. 25 K. B. 537	226
Osborne *v.* Morgan	13 App. Cas. 227	463
Ovingdean Grange, The	[1902] P. 208	142

P.

Patrick *v.* Simpson	24 Q. B. D. 128	122
Peter Bonoit, The	13 Asp. M. L. C. 203	70, 141
Phillips *v.* Evans	12 M. & W. 309	281
Plumb *v.* Cobden Flour Mills Company	[1914] A. C. 62	167
Ponting *v.* Noakes	[1894] 2 Q. B. 281	49
Procurator in Egypt *v.* Deutsches Kohlen Depot	[1919] A. C. 291	317
Produce Brokers Company *v.* Olympia Oil and Cake Company	[1916] 1 A. C. 314	276
Prohibition Case	[1896] A. C. 348	193
Pye, Ex parte	18 Ves. 140	81

Q.

Queen's Advocate *v.* Appuhami	1 Sup. Ct. Cir. 26	263

R.

Rebeckah, The	1 C. Rob. 227	295
Reg. *v.* Registrar of Joint Stock Companies	21 Q. B. D. 131	464
—— *v.* Spurrell	L. R. 1 Q. B. 72	504

		PAGE
Reilly *v.* Greenfield Coal and Brick Company	1909 S. C. 1328	48
Rex *v.* Cotton	45 Can. S. C. R. 469; [1914] A. C. 176	216
—— *v.* Lovitt	[1912] A. C. 212	218
—— *v.* Vancouver Lumber Company	1 West. Weekly Rep. 255	458
Reynolds *v.* Oosthuizen	S. A. L. R. [1916] W. L. D. 103	501
Ricard *v.* Grand' Mère (Ville de)	Q. R. 22 K. B. 272	251
Rivatt-Carnac *v.* Goculdas	I. L. R. 20 B. 15	497
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	286, 502
Ross *v.* London County &c. Bank	[1919] 1 K. B. 678	241
Roumanian, The	[1916] 1 A. C. 124	236
Russell *v.* The Queen	7 App. Cas. 829	197

S.

Ste. Cunegonde (Ville de) *v.* Gougeon	25 Can. S. C. R. 78	250
St. Helena, The	[1916] 2 A. C. 625	117
Salter *v.* Cavanagh	1 Dr. & Wal. 668	120
Sans Pareil, The	[1900] P. 267; 9 Asp. M. L. C. 59	141
Santa Cruz, The	1 C. Rob. 49	318
Saxby *v.* Fulton	[1909] 2 K. B. 208	21
Senécal *v.* L'ile Bizard (Corporation)	3 Queb. Prac. R. 389	251
Seward *v.* Vera Cruz	10 App. Cas. 59	291
Sharpness New Docks and Gloucester and Birmingham Navigation Company *v.* Attorney-General	[1915] A. C. 654	343
Simmer and Jack Proprietary Mines *v.* O'Meara	S. A. L. R. [1916] W. L. D. 57	501
Smith *v.* Archibald Russell, Limited	58 S. L. R. 284; 1921 1 S. L. T. 171	164, 165
—— *v.* Bond	11 M. & W. 549	8
Smith's Settlement, In re	[1903] 1 Ch. 373	428
Sokkanadha Vannimundar *v.* Sokkanadha Vannimundar	I. L. R. 28 M. 344	488
Southwell *v.* Bowditch	1 C. P. D. 374; 45 L. J. (Q. B.) 630	407
Spaight *v.* Tedcastle	6 App. Cas. 217	136
Stephens *v.* Wintringham	3 Com. Cas. 169	397
Stevenson *v.* Glasgow Corporation	1908 S. C. 1034	47
Stimpson *v.* Emmerson	6 L. T. (O. S.) 199	283
Stoddart *v.* Saville	[1894] 1 Ch. 480	428
Stoomvaart Maatschappy Nederland *v.* Peninsular and Oriental Steam Navigation Company	5 App. Cas. 876	136
Südmark No. 2, The	[1918] A. C. 475	232
Surgan Raot *v.* Bhikari Raot	I. L. R. 21 C. 213	484
Surtees *v.* Ellison	9 B. & C. 750	204

T.

Taylor *v.* Plumer	3 M. & S. 562	241
Tennant *v.* Smith	[1892] A. C. 150	502
Thiruvengada *v.* Sadagopa	I. L. R. 34 M. 112	499
Thomson *v.* Advocate-General	12 Cl. & F. 1	218
Thorburn *v.* Barnes	L. R. 2 C. P. 384	482

		PAGE
Tiedemann & Ledermann Frères, In re	[1899] 2 Q. B. 66	242
Torrens *v.* Walker	[1906] 2 Ch. 166	371
Tredway *v.* Machin	91 L. T. 310	372
Turner *v.* S.S. Haulwen	8 B. W. C. C. 242	149
Turul, The	[1919] A. C. 515	316

U.

United States, The	[1920] P. 430	232
Upton *v.* Brown	12 Ch. D. 872	428
Usparicha *v.* Noble	13 East, 332	98

V.

Vagliano Brothers *v.* Bank of England	23 Q. B. D. 243	242
Valeria, The	[1920] P. 81; [1921] 1 A. C. 477	293, 297
Vrow Anna Catharina, The	5 C. Rob. 15	295
Vyse *v.* Wakefield	6 M. & W. 442	371

W.

Waddell *v.* Coltness Iron Company	50 S. L. R. 29; 1912 1 S. L. T. 301	164, 166
Wallace *v.* Attorney-General	L. R. 1 Ch. 1	218
Werle *v.* Colquhoun	20 Q. B. D. 753	420
Westernland, The	24 Fed. Rep. 703	141
White *v.* Turnbull, Martin & Co.	3 Com. Cas. 183	451
Whitebread *v.* Sevenoaks Highway Board	[1892] 1 Q. B. 8	344
Williams *v.* Hathaway	6 Ch. D. 544	259
Wilson *v.* Atkinson	4 D. J. & S. 455	427
Woodruff *v.* Attorney-General for Ontario	[1908] A. C. 508	218
Woolf *v.* Hamilton	[1898] 2 Q. B. 337	21

Z.

Zamora, The	[1916] 2 A. C. 77	297

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

SUTTERS . . . . Appellant; H. L. (E.)*

AND 1921

BRIGGS . . . . Respondent. Oct. 25.

Gaming—Cheque given for Racing Bet—Indorsement in Blank—Banker receiving for Collection—"Indorsee" or "holder"—Gaming Act, 1835 (5 *&* 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

By s. 1 of the Gaming Act, 1835, notes, bills, and mortgages which were by certain Acts of Parliament declared to be void, including notes, bills, and mortgages given as security for money lost in bets on horse races, are to be deemed to be made, drawn, accepted, given, or executed for an illegal consideration.

By s. 2 "In case any person shall . . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited" Gaming Acts "declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be

---

* *Present:* Viscount Birkenhead L.C., Lord Buckmaster, Lord Sumner, Lord Wrenbury, and Lord Carson.

H. L. (E.)

1921

SUTTERS v. BRIGGS.

deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of record" :—

Held, that the "holder" of a note or bill includes the original payee and includes a banker who receives the note or bill for collection.

The loser of a bet on a horse race drew a cheque for the amount of the bet in favour of the winner and crossed it "Not Negotiable a/c Payee Only." The winner indorsed the cheque in blank and handed it to his bankers for collection. The bankers presented the cheque and obtained payment of it. In an action by the loser against the winner under s. 2 of the Act of 1835 to recover the amount of the cheque as having been paid to a holder :—

Held, that the bankers were indorsees and holders of the cheque, and that the plaintiff was entitled to recover.

Nicholls v. *Evans* [1914] 1 K. B. 118 overruled.

Dey v. *Mayo* [1920] 2 K. B. 346 followed.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Rowlatt J.

On October 13, 1920, the respondent made a bet with the appellant that a horse named "Blue Dun" would win the Cesarewitch Stakes and lost. On October 18 the respondent, in payment of the bet, drew a cheque for 50*l.* on his bankers, the London County Westminster and Parr's Bank, Ld., in favour of the appellant or order and gave it to the appellant. The cheque was crossed by the respondent "Not Negotiable a/c Payee Only." The appellant indorsed the cheque in blank and handed it to his bankers, Barclays Bank, Ld., for collection. Barclays Bank presented the cheque for payment to the respondent's bankers, who paid the amount out of funds standing to the credit of the respondent's account with them. At the time of this payment neither the respondent nor his bankers had any knowledge as to the capacity in which Barclays Bank presented the cheque for payment.

On November 5, 1920, the respondent brought an action against the appellant to recover the amount of the cheque under s. 2 of the Gaming Act, 1835, on the ground that the cheque had been drawn in payment of money lost by the respondent to the appellant on a horse race, and that the amount of the cheque had been duly paid by the respondent to Barclays Bank, the holders thereof.

Rowlatt J., on the authority of *Dey* v. *Mayo* (1), gave judgment for the respondent and his judgment was affirmed by the Court of Appeal.

June 27, 28, 30. *Sir John Simon K.C.* and *Sir Edward Marshall Hall K.C.* (with them *Harold Murphy*) for the appellant. The respondent claims by virtue of s. 2 of the Gaming Act, 1835, to recover back a sum of money paid to the appellant by cheque in respect of a bet on a horse race. If the bet had been paid in cash or in bank notes it could not have been contended that the respondent could recover the money, and, in the appellant's submission, it makes no difference in law whether a bet is paid by dipping your pen in ink and writing a cheque for it or by dipping your hand in your pocket and paying it with the money taken from it. The Gaming Act of 1835 was passed, as appears from the preamble, to remedy the injustice arising from the extremely rigorous provisions contained in 9 Anne, c. 14, and the statutes which followed it against gaming and betting on games, and, accordingly, s. 1 provides, for the protection of bona fide holders for value, that securities given for (inter alia) gaming debts shall not, as previously, be void, but shall be deemed to be given for an illegal consideration. Sect. 2 provides that money paid to the holder of any such security given for a gaming debt shall be deemed to be paid on account of the person to whom the same was originally given and shall be deemed to be a debt due from such last-named person to the person who shall have so paid the money and shall be recoverable at law accordingly. That section is consequential on s. 1. It is true that s. 2 does not cover the whole ground of s. 1 but is limited to gaming debts, but that is, no doubt, due to the peculiar detestation in which gaming was held by the Legislature of that period. The right to recover the amount of such security from the person to whom the security was originally given is confined to cases where payment has been made to an indorsee, holder, or assignee who has acquired an independent title thereto, and who is in a position to enforce payment thereof. On the true construction of s. 2 the term "holder" does not include a mere agent for collection, and the fact that the agent for payment is a bank makes no difference. Suppose that, instead of paying the cheque into his bank, the payee had sent his office boy to the bank of the drawer to collect the money, could it be said that the office boy was the holder within s. 2? The question whether the person who has the physical possession of the cheque is a holder within that section cannot depend upon the question whether the agent is a bank or a private individual. As a matter of construction "holder" in s. 2 means a person who holds in his own right and by an independent title, and "actual payment" means payment to some one who receives the money in his own right. Further, this money cannot be treated as paid "for or on account of" the appellant for the payment is to the principal who sends the agent. Apart from the construction of the Act, in 1835 the term "holder" did not include a mere agent for payment: Byles on Bills, 6th ed., 2*n*. Reliance may be placed by the respondent on the Bills of Exchange Act, 1882. The appellant does not admit that Barclays Bank was a holder under that Act. Sect. 77 would seem to imply that a bank acting as an agent for collection was not a holder. By sub-s. 2 of that section "where a cheque is uncrossed, the holder may cross it generally or specially." By sub-s. 6 "Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself." But if the bank was the holder he already had that power under sub-s. 2 and sub-s. 6 was superfluous. Be that as it may, the word "holder" in the Act of 1835 cannot be construed by the light of an Act passed in 1882.

---

(1) [1920] 2 K. B. 346.

[They also referred to s. 82 of the Bills of Exchange Act, 1882.]

Further, a cheque is not a note or bill within the meaning of s. 2 of the Act of 1835. In order to come within the section it must be a security. The Act treats bills and notes as securities and s. 2 speaks of the money thereby secured. The Legislature by the use of that term "security" intended to draw a distinction between payment in præsenti and payment thereafter. That term was used in a definite and well-ascertained sense and involved, first, an acknowledgment of a debt payable at a future date, and, secondly, either an obligation in writing, such as a covenant, or a transfer of property to be retained by the creditor until payment and given up by him to the debtor when the debt was paid. In 1835 nobody would have regarded a cheque as being a security. The Gaming Act of 1835 was really dealing with cases in which, in contrast to a ready-money payment, whether in cash or by cheque, the creditor got a bill or note or security for a payment in future. Then, as now, the giving of a mandate by a customer to his banker was payment as distinguished from security. Further, this cheque is marked "not negotiable," and is thereby reduced to an ordinary assignable chose in action. Therefore the assignee takes the instrument subject to all defects affecting it in the hands of the transferor. It is only in the case of a negotiable instrument that an assignee can get a better title. This distinction is discussed in Anson on Contracts, 12th ed., p. 270. As to the authorities: In *Nicholls* v. *Evans* (1) Channell J. adopts the construction contended for by the appellant. In *Lynn* v. *Bell* (2) Palles C.B. had previously taken the same view of the Act, though his opinion was not necessary to the decision of the case before him. *Golding* v. *Bradlaw* (3) is not inconsistent with that view. In *Dey* v. *Mayo* (4) Avory J. took the same view, but his decision was reversed by the Court of Appeal, and this is really an appeal from the decision of the Court of Appeal in that case. Bankes L.J. bases his judgment in *Dey* v. *Mayo* (4) on the absence of knowledge on the part of the drawer or his bankers as to the representative character of the person presenting the cheque for payment, but if in this case Barclays are holders they are neither more nor less holders by reason of something that the drawer of the cheque does or does not know. The character in which the bank receives payment of a cheque is a question of fact and does not depend upon any question of knowledge: *M'Lean* v. *Clydesdale Banking Co.* (1); *Capital and Counties Bank* v. *Gordon.* (2)

---

(1) [1914] 1 K. B. 118.
(2) (1876) I. R. 10 C. L. 487.
(3) [1919] 2 K. B. 238.
(4) [1920] 2 K. B. 346.

Gilbert Beyfus and *H. Hull* (with them *Kohan*) for the respondent (called upon only on the question whether the bank was an indorsee or holder within s. 2). In order to explain s. 2 of the Act of 1835 recourse must be had to the previous legislation on the subject. The Gaming Act of 1710 provided that if the loser at any gaming transaction of a sum of 10*l.* should pay the amount of the loss he should be at liberty to recover the money within three months in a Court of law and also to get discovery against the winner, and the Gaming Act of 1745 gave to Courts of equity the same power as the Courts of law had. Those provisions, which refer to payments in cash, were still in force when the Act of 1835 was passed and were not repealed until 1845. Therefore in 1835 if the winner of a bet of 10*l.* or more was paid in cash he could be sued for the money, and the real object of the Act of 1835 was to place a winner who had been paid indirectly by a bill or promissory note on the same basis, while at the same time protecting the interests of the innocent holder. No doubt, when the provisions of the earlier Acts were repealed in 1845, s. 2 of the Act of 1835 should have been repealed also, but this was omitted probably per incuriam. If this is the true explanation of s. 2 of the Act of 1835, then there is no reason for restricting the ordinary meaning of the word "holder," which prima facie includes the payee. In *Dey* v. *Mayo* (3) Bankes and Scrutton L.JJ., while holding that bankers who were agents for collection were holders within s. 2 of the Act of 1835, overruling Channell J. in *Nicholls* v. *Evans* (4) on this point, agreed with that learned judge in thinking that the term "holder" did not include the payee himself, and in so restricting the meaning of the word they proceeded on the assumption that if the bet had been paid in cash it could not have been recovered. In this they were historically wrong. But assuming that this argument is erroneous, nevertheless bankers who are agents for collection are holders within the Act. At common law the test of a holder of a bill or note was possession; and the capacity in which a person held was irrelevant: see *Ancona* v. *Marks.* (1) A mere agent has always been allowed to sue and the principle applies equally to indorsees: *Denton* v. *Peters.* (2)

---

(1) (1883) 9 App. Cas. 95, 115.
(2) [1903] A. C. 240, 244.
(3) [1920] 2 K. B. 346.
(4) [1914] 1 K. B. 118.

[LORD CARSON referred to *Law* v. *Parnell.* (3)]

The Bills of Exchange Act, 1882, has not altered the common law on this point. That Act contains the clearest definition of the term "holder" and this bank comes within it. Any person who is in possession of a bill payable to bearer or is in possession of a bill payable to order and indorsed in blank or specially indorsed to himself is a holder: Bills of Exchange Act, 1882, s. 2, "Bearer," "Holder," s. 8, sub-s. 3, s. 34. Inasmuch as Barclays Bank are bearers, being in possession of a bill or note indorsed in blank, they are holders. They are also indorsees. The bankers, though agents for collection, are none the less holders: *Ancona* v. *Marks* (1); *Denton* v. *Peters* (2); *Akrokerri* (*Atlantic*) *Mines, Ld.* v. *Economic Bank.* (4) But it is said that, although under the definitions in the Bills of Exchange Act a mere agent for collection may be a holder, yet, having regard to s. 77, sub-s. 6, bankers are in a different position. The suggestion is that that subsection gives rise to the inference that without it a banker acting as agent for collection could not cross a cheque, but the true explanation is that that sub-section was inserted ex majori cautela. The bank, though an agent for collection, is a holder and as such holder may cross a cheque either generally or specially under sub-s. 2 of s. 77: see Paget on Banking, 2nd ed., p. 86.

Sir Edward Marshall Hall K.C. in reply. *Smith* v.

---

(1) (1862) 31 L. J. (Ex.) 163, 168.

(2) (1870) L. R. 5 Q. B. 475, 477.

(3) (1859) 29 L. J. (C. P.) 17.

(4) [1904] 2 K. B. 465, 472.

Bond (1) shows that s. 2 of the statute of Anne included a payment by cheque as well as a payment in cash. The Act of 1835 by the use of the word "security" was contemplating something which was not payment at the time, and it is remarkable if that Act applied to a payment by cheque that the plaintiff in *Smith* v. *Bond* (1) should nevertheless have had recourse to the statute of Anne. It cannot be seriously contended that at that date the term "holder" included the payee. Bankers acting merely as agents for collection as part of the machinery of payment, to use the language of Channell J., are not to be considered as holders for the purposes of s. 2 of the Act of 1835.

The House took time for consideration.

1921. Oct. 25. VISCOUNT BIRKENHEAD L.C. My Lords, this appeal, in my opinion, fails.

The consequences of this view will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculations as to the probable intention of the Legislature. Where, as here, the legal issues are not open to serious doubt our duty is to express a decision and leave the remedy (if one be resolved upon) to others.

The facts of the case are not in dispute and have been the subject of admissions between the parties.

On October 13, 1920, the respondent betted the appellant 50*l*. that a horse named "Blue Dun" would win the Cesarewitch Stakes, a race to be run on the same day. Blue Dun did not win, and according to the rules which govern betting transactions the respondent became liable, though not in law, to pay the 50*l*. to the appellant. He did so by giving to the appellant a crossed cheque for 50*l*. This cheque was dated October 18, 1920, and was drawn by the respondent on the Oxford Street branch of the London County Westminster and Parr's Bank in favour of the appellant.

(1) (1843) 11 M. & W. 549.

The respondent had written on the face of the cheque the words "Not negotiable" and "a/c payee only." The appellant indorsed it in blank and handed it for collection to the Strand branch of Barclays Bank where he had an account. Barclays Bank duly presented the cheque, and it was honoured in course out of funds standing to the respondent's credit at his bank. Neither the respondent nor his bankers were aware of the capacity in which Barclays Bank were acting, but in fact this bank received payment as collecting agents only.

On November 5, 1920, the respondent issued a writ against the appellant for the recovery of the 50*l.* so paid, basing his claim on s. 2 of the Gaming Act, 1835. A decision of the Court of Appeal in *Dey* v. *Mayo* (1), binding upon both the trial judge and the Court of Appeal, covered the present case in favour of the respondent. Judgment was therefore entered for him and was in due course affirmed on appeal. The case now comes before your Lordships, who are not bound in the matter by any previous decision of this House. We are therefore to consider whether the judgments in *Dey* v. *Mayo* (1) correctly state the law, and whether there is such a right as the respondent contends in the circumstances stated above.

The Gaming Act, 1835, was ostensibly passed with the object of amending existing legislation. It is necessary to advert to the statutes so amended in order to gain a proper appreciation of the earlier law and of the mischief which the Act under consideration was intended to remedy.

The short title of the Act is misleading; but the long title and the preamble make it plain that the effect was by no means confined to gaming transactions. In fact, four classes of statutes were amended and four classes of persons were affected—namely, (1.) Persons who held bills, notes, etc., which had been given in respect of gaming transactions; (2.) Persons who held bills, etc., given in contravention of the usury laws; (3.) Persons who held bills, etc., given in connection with bankruptcy frauds; and (4.) Persons who held bills, etc., given in violation of the statute prohibiting the ransoming of ships.

---

(1) [1920] 2 K. B. 346.

These four classes of statutes had a single and severe feature in common: that the bills, notes, etc., at which they were aimed were declared to be null and void. The result was that however complete the good faith of the holder they were not enforceable, although no circumstance apparent on the face of them could give such a person warning of the vicious origin. The Act of 1835 corrected and alleviated the harshness of these provisions. By s. 1 all such bills, notes, etc., were to be deemed to have been given for an illegal consideration; in other words they were made enforceable at law in the hands of a third person who acquired them innocently. Such was the sole amendment of the law in relation to the three classes of statutes other than the Gaming Acts, for s. 3 of the Act may for this purpose be dismissed as irrelevant. The last-mentioned Acts, were, however, further amended or supplemented by s. 2 of the Act of 1835, which is in these wide general terms: "In case any person shall . . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts" (i.e., the Acts relating to gaming) . . . . "or by any one or more of such Acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's Courts of Record."

This exceptional treatment of bills, etc., given in respect of gaming transactions is remarkable. The reason can hardly be founded upon a special reprobation of gaming nascent in the mind of the Legislature. For it cannot be said that the other three classes of transactions were in just appraisement more venial. The experience of the evils attaching to the ransoming of ships was recent, and the practice had been forbidden from motives of high policy to preserve the existence of the nation during an unprecedented war. A person who committed a breach of this statute added thereby to the enemy's resources, and was liable to a fine of 500*l.*: 45 Geo. 3, c. 72, s. 18. A man so blinded by private advantage as to contemplate a naked disservice to his country could not claim to be of greater moral standing than a gambler. Nor was the first reformed Parliament likely to regard a fraudulent bankrupt, or one who aided him, as a trivial offender. The explanation must be sought elsewhere, and is, perhaps, to be found in the fact that the law relating to gaming as it then existed was, as a mere matter of history, different from the law governing the other prohibited transactions. In 1835 a man who lost and paid a bet of 10*l.* or upwards could recover from the winner the sum so paid. By 9 Anne, c. 14, s. 2, a loser who lost at one time or sitting 10*l.*, and paid the sum lost or any part of it, could recover the amount so paid. This provision was reinforced by the power, given to the Courts of Chancery by the Act 18 Geo. 2, c. 34, s. 3, not merely to grant discovery in aid of an action at law to recover such an amount, but even to decree payment of the same. Moreover, the Act of 9 Anne, c. 19, s. 5, and 18 Geo. 2, s. 8, made it an indictable offence to win or lose 10*l.* at any one sitting, or 20*l.* within twenty-four hours. These severe provisions remained law for a further ten years, until they were repealed by the Gaming Act, 1845. It may be inferred that the intention of Parliament, expressed in s. 2 of the Act of 1835, was to make it clear that the amendment of the law effected by s. 1 was without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto.

I find it necessary to recall the history of the subject, partly because, so far as I am aware, this aspect of the statute has not been touched upon or discussed by any authority other than Atkin L.J., who, in his judgment in

H. L. (E.)
1921
SUTTERS
v.
BRIGGS.
Viscount
Birkenhead L.C.

Dey v. *Mayo* (1), glanced at the matter, and partly because certain judicial dicta have too hastily assumed that the law as it now stands was the law in 1835. Thus Channell J., in *Nicholls* v. *Evans* (2), said: "If a person makes a bet and, having lost, pays it in cash he cannot recover it back. That, I think, is agreed. If that is the case, it seems somewhat ridiculous that the fact that the bet is paid, not in cash, but by the machinery of a cheque, should make any difference": and having made that assumption he employs it in such a way as to limit the meaning of the word "holder" used in s. 2 to "a holder who derives his title from the person to whom the bill or note was given." Again in *Dey* v. *Mayo* (3) Bankes L.J. said: "It may be safely said that there was no intention to make any alteration in the rule of law which provides that a person who pays money to another with full knowledge of the facts cannot recover it back." A similar observation was made by Scrutton L.J. in the course of his judgment in the same case. The fact is that in 1835 direct payments were recoverable if the statutory conditions were fulfilled, and the Act, which was only intended to benefit certain third persons who had become holders of void notes, was so drawn as to prevent this strictly limited modification enuring to the benefit of the person to whom the loser gave the note in settlement of his gaming debt. It was not intended to confer any further rights upon him. This general consideration must be given due weight when the construction of the relevant phrases of the section is approached.

It is abundantly plain that a cheque is a "bill" within the meaning of the section: see s. 73 of the Bills of Exchange Act, 1882, and the judgment of Palles C.B. in *Lynn* v. *Bell.* (4) In the same sense Lord Blackburn pointed out in *M'Lean* v. *Clydesdale Banking Co.* (5) that the definition of a bill of exchange, in s. 3 of that Act, which is in the circumstances evidence of the law before the Act, "completely embraces in it a cheque."

---

(1) [1920] 2 K. B. 364. (2) [1914] 1 K. B. 118, 120. (3) [1920] 2 K. B. 356.
(4) I. R. 10 C. L. 487, 490–3. (5) 9 App. Cas. 95, 106.

The real issue is as to the meaning of the phrase "indorsee, holder, or assignee," and in holding that the respondent is entitled to judgment I am guided by two broad considerations: (1.) That not only is there no reason why the word "holder" used in the section should not be given its natural meaning so as to include the original payee, but that there are positive reasons why that natural meaning should be given. (2.) That bankers are "holders or indorsees" even when, as in this case, they are mere agents for collection.

Taking the first of these considerations in its order, it is important to recall that at the date when the Act was passed a direct payment could, under the conditions stated in the Act of Anne, be recovered and that a bill or note was absolutely void. The Act was intended to give relief to bona fide holders, but in providing such relief the Legislature may quite easily have been influenced by the consideration stated by Channell J.: that the fact that the bet was paid by the machinery of a cheque and not by cash ought in logic to make no difference. The result, however, would in fact be different, as the law then stood, unless express provision were made that the drawer should have a right of recourse against the original payee; in other words, a lawyer of 1835 applying the reasoning of Channell J. must have come to an opinion contrary to that of the learned judge. The danger of not examining the state of the law at the date of the statute which falls to be construed is shown by the fact that it was rather as an inference from the law as established by the Act of 1845 than from the law existing in 1835 that the learned Lords Justices in *Dey* v. *Mayo* (1) held (as indeed it was argued before your Lordships) that the word "holder" in the section does not include the original payee. In fact, this inference rests upon a somewhat obvious fallacy. For just as the Act of Anne with its amending Act enabled direct cash payments to be recovered by action, so s. 2 of the Gaming Act, 1835, made recoverable payments by the machinery of a bill or note which had ceased by virtue of s. 1 of that Act to be void. This

(1) [1920] 2 K. B. 346.

construction may no doubt be said to duplicate in some cases the remedy under the earlier Acts, but no such redundancy could justify your Lordships in denying to the word "holder" its ordinary and natural meaning.

And there are in fact positive reasons in favour of adhering to that meaning. The expressions now in use with regard to bills and notes, with the single exception of the term "holder in due course" were well known in 1835; for example Bayley on Bills of Exchange (1822 ed.), at p. 398, used the expression "bona fide holder for value," and the statute 58 Geo. 3, c. 93, passed only seventeen years before 1835, with the design of affording relief to innocent holders of bills, notes, etc., void under the Usury Acts, had used the narrow phrase "an indorsee for valuable consideration." With this knowledge and with such a precedent available Parliament, in framing s. 2, chose to use the widest possible term, any "indorsee, holder, or assignee." The wide generality of the wording of the section is in marked contrast with the narrow technicality of s. 1, which is intended to effect the object of the statute with the least possible alteration of the law as it then existed. A narrow construction such as the appellant contends for would open a great field for collusion. As Atkin L.J. suggestively pointed out in *Dey* v. *Mayo* (1): "The loser, as before, was not put to inquire and decide whether a bill was presented by a person who was in fact a holder in due course. . . . . If it were otherwise, it is plain that it admits of collusion between the winner and the third party, who might feign a valuable consideration for the purpose of obtaining payment from the loser, but might be in a different mood when the loser required his evidence to support a claim against the winner."

And it must be borne in mind that it is impossible for the drawer to know whether the person, be he banker or not, who presents the cheque for payment, is a holder in his own right or a mere agent for collection. It is a question of fact in each case what is the capacity in which a person holds a bill: *M'Lean* v. *Clydesdale Banking Co.* (2) and *Capital and*

(1) [1920] 2 K.B. 364.

(2) 9 App. Cas. 95, 115.

Counties Bank v. *Gordon.* (1) A drawer could in general only ascertain the facts by fighting an action, but, if he were to lose, s. 2 of the Gaming Act, 1835, gives him no right of action for the costs so incurred; while if he were to pay without a contest the winner would always be entitled to plead that the payment was made to a mere agent for collection.

It may indeed be that the second proposition that bankers are holders or indorsees even when they are merely agents for collection is a necessary inference from the reasons that have influenced me in my view as expressed upon the earlier proposition. But it can in fact be justified upon other and narrower grounds.

It is, as is well known, usual for bankers, in the case of substantial customers at least, to constitute themselves holders in due course, as was the case in *Capital and Counties Bank* v. *Gordon* (2), the result of which case led to the passing of the Bills of Exchange (Crossed Cheques) Act, 1906. At common law, however, the capacity in which a person holds a bill is irrelevant to the question whether he is a holder. The test is possession: see the judgment of Martin B. in *Ancona* v. *Marks.* (3) A mere agent may sue: *Law* v. *Parnell* (4), a case which was cited by my noble and learned friend Lord Carson during the argument. The same principles apply to indorsees: *Denton* v. *Peters.* (5)

The definitions, cited on behalf of the appellant, from early editions of Byles on Bills and from Chalmers are not inconsistent with this principle. The words "entitled at law to recover" mean only "not liable to be defeated in an action on the bill on the ground that the action has been brought against the wrong party." These very text-books actually contemplate a mere agent suing upon a bill: see, e.g., Byles on Bills, 4th ed., 1843, p. 120: "If the party presenting be the mere agent of another, the agent's title is infected with the infirmity of his principal's title, although the principal is in the agent's debt, and the agent consequently cannot enforce payment of the maker."

---

(1) [1903] A. C. 240, 244.
(2) [1903] A. C. 240.
(3) 31 L. J. (Ex.) 163, 168.
(4) 29 L. J. (C. P.) 17.
(5) L. R. 5 Q. B. 475, 477.

The common law was not altered in this respect by the Bills of Exchange Act, 1882. By s. 8, sub-s. 3, "A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." By s. 34, sub-s. 1, "An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer." Now, in the present case, Barclays Bank was in possession of a bill indorsed in blank, and therefore payable to bearer. Therefore the bankers were bearers, and as bearers, were also holders. This follows from the definitions in s. 2 of the Act. "'Bearer' means the person in possession of a bill or note which is payable to bearer," and "'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof." It follows from the Act itself that the term "holder" includes an agent for collection. As Bigham J. said in *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank* (1): "Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection." And the note, with which I agree, at p. 5 of Chalmers' Bills of Exchange, 7th ed., is to the same effect: "The term 'holder' includes . . . . (*b*) the person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though, as between himself and his transferor, he is a mere agent or bailee with a defeasible title, *e.g.*, an indorsee for collection."

I recall, only to reject as fallacious, the arguments based on s. 77, sub-s. 6, and s. 82 of the Bills of Exchange Act, 1882.

Sect. 77, sub-s. 6, is as follows: "Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

The argument on this point is that as the sub-section gives a banker power to cross a cheque, sent to him for collection, specially to himself, it necessarily follows that he would not

(1) [1904] 2 K. B. 465, 472.

have that power apart from the sub-section, and is not a holder. It is implicit in such an argument that although a banker who is acting as an agent for collection has the major right of crossing a cheque specially to himself he does not possess the minor rights of crossing it generally, or specially to another banker, or of making it not negotiable. Therefore a country banker to whom a cheque is sent for collection may not cross it specially to the bankers acting as his agents even for the purpose of safeguarding it in transit. A decision involving such a consequence would effect a revolution in banking practice, and would supply at least as great a shock to bankers as *Dey* v. *Mayo* (1) to bookmakers. This sub-section, which was not in s. 5 of the Bills of Exchange Act, 1876, was possibly inserted ex abundanti cautela, lest it might be argued that the practice was unlawful as constituting a breach of the relation of principal and agent, inasmuch as it recognized only payment made to the agent.

Nor does s. 82 afford assistance to the appellant. The words of that section are: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent for collection is not a "holder." On the contrary, the opposite inference is far more plausible—namely, that the protection became necessary because he is a holder and as such liable to an action for conversion. The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act, 1906, confers the same protection on bankers who by their action have made themselves not merely "holders," but "holders in due course": see *Capital and Counties Bank* v. *Gordon* (2) and per Bowen L.J. *National*

---

(1) [1920] 2 K. B. 346.

(2) [1903] A. C. 240.

Viscount Birkenhead L.C.

Bank v. *Silke.* (1) Moreover, if bankers are not holders of cheques for which they are agents for collection only, they derive no benefit from s. 27, sub-s. 3, as the subsection does not apply even where there is a lien to a person who is not a holder.

For these reasons I think that s. 2 of the Gaming Act, 1835, was designed to preserve the right of the loser of a bet to recover the amount even when it was paid by means of a cheque, thenceforth made enforceable in the hands of a third party under the conditions stated in s. 1.

There is indeed no reason for limiting the natural and ordinary meaning of the words used. The term "holders or indorsees" means any holder and any indorsee, whether the holder be the original payee or a mere agent for him, and the rights of the drawer must be construed accordingly. The circumstance that the law apart from the section in question was repealed in 1845, without any repeal of the section itself, may lead to anomalies, but cannot have weight in construing the section.

I move your Lordships, for these reasons, that this appeal be dismissed with costs.

My Lords, I have only to add that my noble and learned friends Lord Buckmaster and Lord Carson ask me to say that they have read the judgment which I have just delivered and assent to its conclusions and to the reasoning upon which those conclusions are based.

LORD SUMNER. My Lords, on October 13, 1920, Mr. Briggs put 50*l.* on "Blue Dun" for the Cesarewitch and lost. On the Monday following he paid the bookmaker, Mr. Sutters, by a cheque on the London County Westminster and Parr's, crossed "not negotiable a/c payee only." Mr. Sutters indorsed it generally and paid it into his account with Barclays Bank for collection, and it was duly cleared and paid. Accordingly, by his bankers on whom the cheque was drawn, the respondent did actually pay to an indorsee of this note or bill the amount of the money thereby secured.

(1) [1891] 1 Q. B. 435, 439.

Why, then, cannot he recover the amount of it from the appellant by action at law, pursuant to 5 & 6 Will. 4, c. 41, s. 2?

It may be as well to note that the appellant's counsel did not rely on the fact that the money was lost, not at cards, dice, tables, tennis, or bowls, but on a horse race. They accepted that, as Fletcher Moulton L.J. observes in *Hyams* v. *Stuart King* (1), a long series of cases has settled that horse racing is within the statutes of Anne and William IV. Their major reason was that Barclays Bank were not indorsees within the meaning of that section. All the argument on the word "holder" fails, unless the word "indorsee" can also be negatived, and the difficulties put in connection with "holder" can only be made relevant by arguing that if "holder" can first be shown to mean holder by an independent title and particularly holder for value without notice, then the same thing will be true of "indorsee," thanks to the mere collocation of the words. As Barclays Bank certainly were indorsees within the mere words of the section, the meaning desired must be got from the policy of the Act and more particularly from the policy, as described in or implied from the preamble. There is a minor reason given also—namely, that the Act only deals with instruments, which secure a debt, and not with instruments, by which a debt is paid. This again must be got from the preamble, for it is no part of the enacting words. The prior legislation clearly avoided all notes and bills in the hands of third parties, whether given to the original taker as a paper payment conditional on a future cash payment, or as security for future payment, and I see nothing to justify us in excluding from the remedial legislation which replaced it, the former class (obviously not the least important), where the document can technically be called a payment, though barren because unenforceable by the payee. Further, the point that Barclays were collecting the cheque simply for Mr. Sutters, who could have sent a clerk to the counter of the London and County Bank but for the crossing, is either

(1) [1908] 2 K. B. 696, 715.

irrelevant or begs the question. If s. 2 gives a position of unqualified advantage to any indorsee, the point does not arise, and it cannot be made to arise merely by saying that with another instrument in another form a course might have been taken, which would possibly have made the point arise.

The ground may be cleared here of another argument equally ingenious but equally groundless. It is said that "shall actually pay to any indorsee" is to be interpreted by referring to the later words, "such money so paid shall be taken to have been so paid for and on account of" Mr. Sutters. Now to sue Mr. Sutters for money paid to his use to Mr. Sutters is going round and round and is ridiculous. You cannot take money to have been paid for account of Mr. Sutters, unless it has been paid to some one who is not Mr. Sutters or his messenger or his mere agent. It follows that payment to a mere collecting bank is not payment to an indorsee within the section. I pass over the point that a banker's lien is not merely over the paper on which the order to pay is written but over the chose in action, which that order to pay creates, and that Barclays had such a potential interest by way of lien on this cheque as would have been made actual at will, if they had chosen to credit Mr. Sutters with the amount and to notify him of the fact before the cheque was cleared. I think the whole argument on this point fails. If the section means "any indorsee," as it certainly says it, and Barclays Bank were indorsees, then the Legislature does not care for whom that Bank acted, nor does it look behind them. The question again comes round to asking whether any qualification on "any indorsee" is implied ? This, after all, is always the question.

The Legislature plainly meant to help persons who had taken, for value and without notice of the consideration for which they had been given, certain instruments and securities, which prior statutes had made void as having been given in consideration of losses at play or for the purpose of receiving a usurious rate of interest, or by insolvents in consideration of improper assistance by individual creditors, or by way of ransom of ships and cargoes contrary to law. In pointing this out very eminent judges have in some cases used language which not only affirmatively states this intention, but negatively avers that both in intention and in effect the Act of 1835 went no further: e.g., *Hay* v. *Ayling* (1), per Campbell C.J., approved in *Woolf* v. *Hamilton* (2); *Hyams* v. *Stuart King* (3), per Fletcher Moulton L.J.; *Saxby* v. *Fulton* (4), per Buckley L.J. As, however, s. 2 of the Act of 1835 and the rights of such a person as the present respondent were not in issue in these cases, the opinions so expressed are not decisive. The questions now arise, first, did the Legislature intend to do this and no more? and second, if so, did the Legislature completely effect its limited purpose by s. 1, which replaces the avoidance of such instruments by merely deeming them to have been given for an illegal consideration? This may be so, for there is nothing to show that s. 2 is ancillary only and not an independent provision, and if so, the preamble does not affect it. Indeed, whatever ground there is for thinking that the holder for value is the subject of the benevolence of the Legislature, is to be found in s. 1. The change which it makes is really beneficial to and is directed to the holders of negotiable instruments, but that exhausts the benefit, and s. 2 is enacted for the benefit of the person who pays the holder, whether under compulsion of law or not this section does not say. The recital of the Acts against gaming, passed under Charles II., William III., and Anne, which dealt with instruments given both as security for and in satisfaction of gaming debts, shows that for the purposes of this enactment "note, bill, or mortgage" in s. 2 are words covering both classes of instrument. The recital of the mischief, that the instruments dealt with are "sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice," followed by the words "for remedy thereof be it enacted," shows pointedly that the omission from the enacting sections of any reference to valuable consideration or to notice is

(1) (1851) 16 Q. B. 423, 431.
(2) [1898] 2 Q. B. 337, 339.
(3) [1908] 2 K. B. 696, 714.
(4) [1909] 2 K. B. 208, 229.

deliberate. The preamble rather suggests that the enacting words do not refer only to transferees for value without notice than that they do.

Turning next to the words of s. 2, and assuming that the objects recited in the preamble are not exhausted by s. 1, the instruments mentioned fall into two classes—namely, negotiable instruments, whether or not their negotiability is restricted, and instruments that cannot be called negotiable instruments at all, but the enactment applies equally and in the same way to both. If the instrument has been given upon a consideration, for which any of the recited Acts would have made it void, actual payment to any indorsee of any bill and actual payment to any assignee of any mortgage give the same right of action to the party who pays. Accordingly, if such words as "for value without notice" are to be imported as an implied qualification upon "indorsee" or "holder," they must be equally capable of being imported to qualify "assignee," and conversely, if they cannot be attached by implication to the last word, they cannot be attached to the others. Now an indorsee of a bill, taking it for value and without notice, needs no further help than is involved in substituting a presumed illegal consideration for entire avoidance, but an assignee of a mortgage, which the mortgagee cannot enforce because it was given for an illegal consideration, must stand in his assignor's shoes and can have no better right than he had, whatever value he may have given and whatever notice he may have escaped. It follows that, as the section treats both categories alike, the result of this implication would be that the party paying would get his remedy over in the one case, because he could have been made to pay and in the other because he could not, a hopeless inconsistency not to be imputed to the Legislature. The words are "actually pay," not "be compellable to pay and actually pay" or "shall elect to pay and shall actually pay," and they are "any indorsee" not "any indorsee for value without notice." The fact is that the assistance designed cannot be given to assignees of mortgages and to indorsees of bills of exchange in the same sentence and in the same way without disregarding the negotiability of the latter instruments. If the intention of assisting persons who have given value without notice, as indicated by the preamble, was all that the subsequent sections were meant to give effect to, one would have expected the enactment to be in such cases, that these persons either should be entitled to sue on the instrument, notwithstanding that it had been made void by the recited Acts, which *Edwards* v. *Dick* (1) had decided could be done in the case of a drawer and indorser of a bill, when sued by the indorsee for value, or should recover from their transferors the amount of the value given, as money had and received. The fact that neither course is taken shows that, whatever object this long preamble is supposed to serve, it did not control or qualify the actual enactment; as a matter of fact I think it had very little to do with it.

If, however, the section is read as meaning all that it says, no more and no less, a scheme appears which is at least practical. As early as 1821 the intention of the Act of 9 Anne had been recognized as being to prevent a winner from obtaining money by way of gaming and to disable him from keeping money won at play, even though indirectly obtained. "No person, who derives his title through the winner, can make the loser pay": Abbott C.J. and Holroyd J. in *Edwards* v. *Dick*. (2) The idea of this amending Act seems to be to encourage the unsuccessful gamester to pay third parties by enabling him to pass his payment on to the winner, if he does. He has gambled and lost and has not paid anybody. He has merely parted with paper, which turns up in third parties' hands. The Legislature imposes the test of liability to be brought into Court and put to the possibly unpleasant necessity of pleading this Gaming Act. The section makes it worth his while to pay and save his credit, and gives him the satisfaction of recovering the money from the winner, and so getting even with him. Persons, whose business it is to oblige backers, may not appreciate it, but I do not see why it should not be popular

(1) (1821) 4 B. & Al. 212, 215.

(2) Ibid. 215, 216, 217.

with persons, whose business it is to be bona fide holders for value. At any rate, this is what the section says, and it is the result of deliberate abstention from drawing any distinction between those who have given value and those who have not.

My Lords, I should mention two minor points. By virtue of the Bills of Exchange Act Barclays were "holders" as well as indorsees, and had such rights as attach to a holder in due course. I do not see why, in this case, effect should not be given to the Act of 1882, since nothing in the Act of 1835 prevents it. "Holder" as used in 1835 is not shown to be exclusive of or inconsistent with "holder" as used in the code. It is said that, if so, holder in the Act of 1835 includes the payee of the cheque, for he would be a holder under the Bills of Exchange Act. One must note that from 1835 to 1845 the loser of more than 10*l.* at gaming remained entitled by the Act of 9 Anne to recover any cash paid directly to the winner, quite independently of the Act of 1835. It is not, therefore, clear that in 1835 the Legislature was much impressed in this connection by the common law rule, which makes a voluntary payment irrecoverable. Still, here, I think, the earlier Act is inconsistent with such an effect; for the result would be that, if the respondent had chosen to pay the cheque to the appellant, he could have recovered the money from him again, the express provision of the section overriding the general rule that money voluntarily paid is irrecoverable. This cannot be; to put it decorously, the Act must be interpreted so as to avoid circuity of action; to put it bluntly, such an interpretation would simply make the section silly. As for the point, taken but faintly before your Lordships, that the matter is in some way affected by this cheque's being crossed and marked "for account of payee only, not negotiable," I think it does not arise. Sect. 2 deals with bills and notes generally, as it does with mortgages generally. It draws no distinction between bills which are and bills which are not marked not negotiable, and applies the same consequent right to an actual discharge of all. It is not to be read distributively or as if the words were

H. L. (E.)
1921
SUTTERS
v.
BRIGGS.
Lord Sumner.

"negotiable note or bill" or "not negotiable note or bill and mortgage," but the payment is to be to any indorsee of the note or bill, which is indorsed. The question is not whether this cheque was marked not negotiable so as to restrict its negotiability in accordance with s. 81 of the Act, but whether it is a note or bill. No one has argued that it was not. If Barclays were within the class of "any indorsees of a note or bill," the addition of the words "not negotiable" to the bill does not take them out of the class again. An argument can only arise upon these words, if, by some implication, there is introduced into the section the test of the ability of the indorsee or holder to sue and recover on the instrument, which is the very point in debate. In any case they are indorsees.

The general policy of the Act of 1835 is finally appealed to. I think, if this point is distinguishable from the argument upon the words of the preamble, it really involves an inquiry whether this was a sensible piece of legislation or not, which is hardly a judicial question. The earlier Acts adopted a position of compromise. Gamesters were not to be punished, but they were to be impartially inconvenienced. Unfortunately, ignoring patent facts does not help one for long, and the existence and accommodating disposition of third parties raised another and a pressing question. The desire to help them involved the Legislature in the necessity of favouring either the winner or loser, for if third parties were to be paid the law could no longer stand indifferent. As luck would have it, when the Legislature interfered again, it was the winner who lost; "victa Catoni." I cannot tell why. It looks like a compromise and it is little use speculating about the motive for a compromise. The whole policy of the law as to betting is hard to understand by itself; it becomes harder still when the remedial measure includes in one and the same provision not merely betting, but lending money at more than 5 or 6 per cent., and frauds on creditors or on the law of ransom. I can only see one common policy applicable to all four, and that is to discourage them all alike, by making each of them severally not worth while.

H. L. (E.)
1921
SUTTERS
v.
BRIGGS.
Lord Sumner.

If that is all, it does not help the appellant. As far as betting goes the discouragement is not very formidable, for it enlists, on the side of payment of debts of honour, that large class of persons (among whom of course I do not include Mr. Briggs) who find nothing so repugnant to them as the discharge of a sordid legal obligation. The appeal, in my opinion, fails.

LORD WRENBURY. My Lords, I also am of opinion that this appeal fails. Many points have been argued before your Lordships but the appeal fails if, as I think is the case, Barclays Bank were indorsees or holders of the cheque within s. 2 of the Act of 1835. The skeleton frame of that section is as follows: If the drawer shall actually pay the indorsee, holder or assignee, the payment shall be deemed to have been made for and on account of the drawee and shall be a debt owing from the drawee to the drawer and shall be recoverable. In this language the holder is, I think, any person who so holds the cheque as that in the ordinary case he could sue the drawer upon it. I have had the advantage of considering the opinions just expressed by the Lord Chancellor and Lord Sumner. I agree with their reasoning and cannot usefully add anything to it. I think the appeal fails and should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Oct. 25, 1921.

Solicitors for the appellant: *Charles Russell & Co.*
Solicitor for the respondent: *H. Levy.*

[HOUSE OF LORDS.]

H. L. (E.)*

1921

Nov. 8.

CORPORATION OF BLACKPOOL . . APPELLANTS;

AND

STARR ESTATE COMPANY, LIMITED . RESPONDENTS.

Land—Acquisition by Local Authority—Compensation—Assessment—Voluntary or Compulsory Purchase—Statute—Construction—General and Special Acts—Blackpool Improvement Act, 1917 (7 *&* 8 *Geo.* 5, *c. lii.*), *s.* 70—*Acquisition of Land* (*Assessment of Compensation*) *Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 7, *sub-s.* 1.

The Blackpool Improvement Act, 1917, s. 70, enacted that the provisions of the section should, unless otherwise agreed in writing, apply for the benefit and protection of a certain company as owners of the land referred to in the section. By its terms the owners were to sell and the corporation was to buy the land therein described at a price to be determined, in default of agreement, by arbitration in the manner provided by the Lands Clauses Acts as modified by that Act, and a notice to treat was to be served by the corporation within a defined time. It was further provided that the corporation should not use the land so acquired for certain purposes which might cause a nuisance or annoyance to the owners.

By the Acquisition of Land (Assessment of Compensation) Act, 1919, where by any statute (whether passed before or after the passing of this Act) land is authorized to be acquired compulsorily by any local authority, any question of disputed compensation is to be determined in the manner thereby provided (s. 1, sub-s. 1), and the provisions of the Act by which the land is authorized to be acquired, or of any Act incorporated therewith, so far as inconsistent with this Act, shall cease to have effect (s. 7, sub-s. 1).

Notice to treat was served on the owners by the corporation shortly before the coming into operation of the Act of 1919, but no arbitrator had been appointed to fix the price. A question having arisen whether the compensation was to be assessed under the Act of 1919 or under the private Act of 1917:—

Held, that the Act of 1919 did not apply, and that the compensation was to be ascertained in the manner provided by the Lands Clauses Acts as modified by the Act of 1917; by Viscount Finlay, Viscount Cave, and Lord Phillimore on the grounds, (1.) that s. 70 of the private Act embodied an agreement between the parties for the sale and purchase of the land and that the land was not "authorised to be acquired compulsorily"; (2.) that the general language of the Act of 1919 ought not, in the absence of clear words, to be construed as affecting the special provisions of s. 70 of the private Act of 1917; by Viscount Haldane on the second ground; by Lord Shaw of Dunfermline (dissenting as to the second ground) on the first ground only.

Decision of the Court of Appeal affirmed.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

APPEAL from an order of the Court of Appeal reversing a judgment of Mr. Commissioner Taylor K.C.

The question raised by the appeal was whether upon the true construction of the Acquisition of Land (Assessment of Compensation) Act, 1919, the appellants, the Corporation of Blackpool, were entitled to have the compensation payable by them for certain land of the respondents, the Starr Estate Co., Ld., authorized to be acquired by the appellants by the Blackpool Improvement Act, 1917, ascertained under the Act of 1919, or whether such compensation was to be ascertained in manner provided by the Lands Clauses Acts as modified by the local Act of 1917.

By s. 62 of the Blackpool Improvement Act, 1917, the corporation were empowered to "enter upon, take and use all or any part of the following lands delineated on the deposited plans and described in the deposited book of reference," and then followed a description of the lands so referred to, including the land of the respondents the subject of this appeal.

Sect. 65 provided that the powers of the corporation for the compulsory purchase of lands for the purposes of the Act should cease after the expiration of five years from the passing of the Act.

Sect. 70 provided as follows: "The following provisions shall unless otherwise agreed in writing between the Starr Estate Company (hereinafter called 'the owners' which expression shall where the context so admits include their successors and assigns) and the Corporation apply and have effect for the benefit and protection of the owners and their estate (that is to say): (1.) The owners shall sell and the Corporation shall purchase the whole of the lands and premises delineated on the deposited plans which belong to the owners with the easements and appurtenances appertaining thereto or connected therewith." Then followed a description of the lands, being the lands to which this appeal relates. "(2.) The price to be paid by the Corporation to the owners for the said lands shall in default of agreement be determined by arbitration in the manner provided by the Lands Clauses Acts as modified or altered by this Act:

(3.) The Corporation shall serve upon the owners notice to treat under the Lands Clauses Acts as soon as possible after the termination of the present war and at the most within a period of three years after such termination and in the event of the award of the arbitrator not being made before the expiration of the said period of three years the Corporation shall pay to the owners interest at the rate of five and a quarter per centum per annum on the amount of the purchase money which the arbitrator shall by his award find to be payable to the owners by the Corporation for the said lands such interest to be paid half-yearly from the expiration of the aforesaid period at the end of every six months therefrom until actual completion of the purchase by the Corporation of the said lands :"

Sub-s. 4 provided that the corporation should not use or permit suffer or allow the lands or any part thereof acquired or purchased by them under that Act from the owners to be used for certain purposes therein mentioned so as to be a nuisance or annoyance to the owners.

Sub-s. 10 provided that the conveyance of the said lands to the corporation should notwithstanding the provisions of s. 81 of the Lands Clauses Consolidation Act, 1845, be in such a form as should be mutually agreed upon between the parties or in case of dispute as to the form thereof determined in the manner thereinafter mentioned.

Sub-s. 11 provided that any dispute under the section should be referred to arbitration.

Sects. 71 and 72 contained similar provisions as regards two other owners.

On August 20, 1919, the appellants served upon the respondents notice to treat in respect of the land referred to in s. 70, and on September 17 the respondents delivered to the appellants their notice of claim.

On the failure of the parties to agree the amount of compensation payable in respect of these lands, the appellants claimed that they were entitled to have such disputed compensation ascertained under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The respondents disputed this claim and brought an action against the appellants in the King's Bench Division for a declaration that they were entitled to have the price of the land ascertained in manner provided by the Lands Clauses Acts as modified by the local Act.

The Acquisition of Land (Assessment of Compensation) Act, 1919, was passed on August 19, 1919, and came into operation on September 1, 1919.

This Act provided (so far as material) as follows:—

Sect. 1, sub-s. 1: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation . . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section."

Sect. 2 provided rules for the assessment of compensation.

Sect. 7, sub-s. 1: "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect:"

Sect. 12, sub-s. 1: "This Act . . . . shall come into operation on the first day of September nineteen hundred and nineteen, but shall not apply to the determination of any question where before that date the appointment of an arbitration, valuation, or other tribunal to determine the question has been completed, or a jury has been empanelled for the purpose."

The action was tried at the Manchester Assizes before Mr. Commissioner Taylor K.C., who held that the compensation ought to be determined under the Act of 1919. The Court of Appeal (Bankes, Atkin and Younger L.JJ.) reversed this decision and held that s. 70 of the private Act amounted to a statutory contract of sale and was not affected by the Act of 1919. They accordingly declared that the respondents were entitled to have the price of the land ascertained in the manner provided by the private Act.

1921. October 20. *Maugham K.C.* and *W. M. Hunt* (with them *Cockshutt*) for the appellants. The land of the respondents was land authorized to be acquired compulsorily by a local authority within the meaning of s. 1, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919. Therefore the compensation is to be assessed in the manner provided by that Act and the provisions in this regard in s. 70 of the Blackpool Improvement Act, 1917, cease to have effect: s. 7, sub-s. 1. This land was included in s. 62 of the local Act, which gives to the corporation compulsory powers of acquiring land. Sect. 70 of the local Act does not amount to a contract between the appellants and the respondents, but is merely a legislative enactment binding the appellants to exercise their compulsory powers in respect of this land. The provision in that section as to the service of a notice to treat connotes the idea of compulsory acquisition. Under a notice to treat there is no contract or change of ownership until the price or compensation is actually ascertained, and if after notice the corporation refuse to proceed the landowner has no remedy in equity but must apply for a mandamus: Fry on Specific Performance (5th ed.), §§ 133, 135, 138; Craies on Statute Law (1st ed.), pp. 460, 461; *Davis & Sons, Ld.* v. *Taff Vale Ry. Co.* (1) There is nothing in s. 70 to differentiate this land from other land authorized to be acquired under s. 62.

Hogg K.C. (with him *Neilson K.C.* and *William Allen*) for the respondents was asked to state his points. Sect. 70 of the local Act records a parliamentary bargain made between the parties and in the absence of plain language pointing to that conclusion the general words of the Acquisition of Land (Assessment of Compensation) Act, 1919, ought not to be construed so as to derogate from the special terms of the local Act. This land is not land

(1) [1895] A. C. 542.

authorized to be acquired compulsorily. Under the provisions of s. 70 of the local Act the appellants acquired the land and were not merely authorized to acquire it. The general words in a public Act do not override a specific provision in a private Act unless it is clearly shown that they are intended to have that effect.

Maugham K.C. replied.

The House took time for consideration.

1921. Nov. 8. VISCOUNT HALDANE. My Lords, the decision of the question before us turns on a single point. Did the general enactment in the Acquisition of Land (Assessment of Compensation) Act, 1919, which provided what is prima facie an exclusive and uniform method for ascertaining the compensation to be paid for land authorized to be acquired compulsorily by certain authorities, including the appellants, repeal and supersede the provision made in s. 70 of the Blackpool Improvement Act, 1917, for the special case of a purchase from the respondents? That section was to apply, unless otherwise agreed in writing, for the benefit and protection of the respondents. By its terms the respondents were to sell and the appellants were to buy the land as to which the controversy has arisen, at a price which was to be ascertained in a fashion more advantageous to the respondents than that prescribed by the later statute. The parties being put under reciprocal obligation to sell and buy, the price was to be determined by arbitration under the Lands Clauses Acts, and a notice to treat was for this purpose to be served by the appellants within a closely defined time. The case of the respondents was one out of three resembling cases, the others of which were analogously provided for each in a separate subsequent section. Under the three sections the appellants and the two other owners whose land was to be bought by the appellants obtained, as part of the special arrangements with them, restrictions on the freedom of the appellants in using the lands acquired.

My Lords, with the policy of the Act of 1919, and with the

H. L. (E.)
1921
BLACKPOOL CORPORATION v. STARR ESTATE CO.
Viscount Haldane.

purposes for which it was passed, we are not at liberty to concern ourselves in deciding the question of law before us. What we have to determine is whether the special provision made in a case such as that of the appellants in the Blackpool Improvement Act of 1917 is to be deemed to have been altered by the general legislative principle enacted by the Public Act of 1919. The special provision may or may not confer on the respondents rights which can only be asserted by mandamus, as distinguished from proceedings for specific performance directed to what was the original reciprocal obligation of the parties to buy and to sell, at a price to be determined by arbitration, and under the restrictions enacted. The question does not appear to me to be an important one. For what is at least clear is that the case of the respondents was one which had been dealt with individually and in special detail by Parliament. It is not left to legal relationship of a merely general character. It represents rather what was apparently a bargain made between two corporations, one of which held land which the other desired to obtain, a bargain which was part of the basis on which Parliament passed the Act of 1917. It is said for the appellants that the language of s. 1 of the subsequent statute is wide enough to include even such a special bargain. No doubt it may be said that it was so, if its terms could be construed merely by themselves without reference to any other consideration. Sect. 1 declares that where under any statute (whether passed before or after the Act of 1919 itself) land is authorized to be acquired compulsorily by such an authority as the appellants, any question of disputed compensation is to be determined in a new fashion. Sect. 7 says that the provisions of any Act or order by which the land is authorized to be acquired, or of any Act incorporated therewith, in relation to the matters dealt with in the Act of 1919, are to have effect only subject to that Act, and not so far as inconsistent with it. I will assume that the transaction is one relating to land "authorised to be acquired" within the meaning of that section. That it is so is not free from doubt, for the land is land which, by s. 70 of the Act of 1917, the appellants are bound to buy, as distinguished from merely authorized to do so. But even so, the transaction is in the nature of a special and individual bargain and is not merely referred to the operation of a general principle of statute or other law.

My Lords, in that state of matters we are bound, in construing the general language of the Act of 1919, to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject-matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest.

My Lords, applying this rule of construction I do not think that we can presume that, in using the general language, however sweeping, of the Acquisition of Land Act of 1919, Parliament intended to rip up the bargain specifically and individually made by the respondents. It appears to me that the conclusion come to by the Court of Appeal was right, and that this appeal ought to be dismissed with costs.

VISCOUNT FINLAY. My Lords, the question in this case is whether the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, apply to the assessment of compensation in respect of the acquisition by the appellants of certain land belonging to the respondent company.

The land was acquired under the Blackpool Improvement Act, 1917 (7 & 8 Geo. 5, c. lii.), the last of a series of local Acts applying to Blackpool. That Act incorporated the Lands Clauses Acts with certain modifications, one of which was that any question of disputed compensation was to be determined by a single arbitrator. Sect. 62 empowered the corporation to enter upon, take, and use any part of certain specified lands delineated on the deposited plans, which include the lands now in question. By s. 65, the powers of the company for compulsory purchase of lands were to cease after the expiration of five years from the passing of the Act. By s. 69 confirmation was given to an agreement between Blackpool Pleasure Beach, Ld., and the corporation, set out in the Third Schedule to the Act, being an agreement for the acquisition by the corporation, on terms specified, of certain land for the purpose of works. Then followed s. 70, which is the material section in the present case. It enacts that the provisions therein set out shall, unless otherwise agreed in writing between the owners (the respondents) and the corporation, apply for the protection of the owners and their estate. These provisions are that the owners should sell and the corporation should purchase the lands in question, that the price should, failing agreement, be determined by arbitration as provided by the Lands Clauses Acts as modified by the local Act, and that the corporation should serve upon the owners notice to treat as soon as possible after the termination of the war and at the most within three years after its termination, with a provision for interest if the award were not made before the expiration of the said three years. Provisions follow preventing the corporation from using the lands for certain purposes which might cause a nuisance or be considered offensive. Provisions for the protection of certain other owners, Shutt and Robinson, were contained in ss. 71 and 72.

The corporation gave notice to treat on August 20, 1919. The Acquisition of Land (Assessment of Compensation) Act, 1919, had been passed on August 19 and came into operation on September 1, 1919.

By that statute (9 & 10 Geo. 5, c. 57), where by or under any statute "land is authorised to be acquired compulsorily by any Government department or any local or public authority, any question of disputed compensation" is to be determined by an arbitrator to be selected from a panel of official arbitrators set up by the Act (s. 1), the arbitrator is to proceed in accordance with certain rules set out in s. 2, which negative any allowance on account of the acquisition being compulsory and otherwise provide for limiting the amount to be recovered as compensation. By s. 12 the Act was to come into operation on September 1, 1919, but was not to apply "to the determination of any question where before that date the appointment of an arbitration, valuation, or other tribunal to determine the question has been completed, or a jury has been empanelled for the purpose."

The respondent company brought this action against the corporation to have it declared that the compensation for their land should be assessed under the private Act of 1917 and not under the provisions of the general Act of 1919.

The case was tried at the Manchester Assizes by Mr. Commissioner Taylor K.C., who gave judgment for the corporation, dismissing the action with costs. His decision was reversed by the Court of Appeal (Bankes, Atkin and Younger L.JJ.), and judgment was entered for the company with a declaration that the compensation should be assessed under the Private Act and not under the Act of 1919. The corporation have brought the present appeal seeking to have it declared as held at the trial that the compensation must be assessed as provided in the Act of 1919.

The question is simply whether the question of compensation for this land falls within the scope of the Act of 1919. In my opinion it does not.

It was argued on behalf of the appellants, that the case falls within the statute of 1919 by virtue of the provision in s. 62 of the local Act of 1917 authorizing the corporation to take any part of the lands delineated in the deposited plans. It was said that the lands so delineated include the land of the respondents now in question, and it was urged that it followed that s. 62 applied and that the compulsory acquisition of this land was thereby authorized. This argument overlooks the fact that the same Act contains also s. 70, which came into force simultaneously with s. 62. The special provisions of s. 70 with regard to the respondents' land exclude the contention that the land was acquired under s. 62. It was acquired and it could be acquired only under and in conformity with the provisions of s. 70. That section provides for the sale by the owners and the purchase by the corporation of the land in question at a price to be ascertained by arbitration under the Lands Clauses Acts as modified by the Local Act. These special provisions in the Act itself made it impossible for the corporation to acquire the land otherwise than under s. 70 and in accordance with its terms.

From the language of s. 70 it is obvious that it embodies an agreement between the parties for the sale and purchase of the land. It follows that the land is not acquired compulsorily at all. It is acquired under the agreement embodied in s. 70. The whole argument of the appellants breaks down upon this short point, as it is only to cases of compulsory acquisition that the Act of 1919 applies.

But apart from this consideration, the land was certainly acquired on the special terms of s. 70, and these special terms are wholly inconsistent with the application of the Act of 1919. Even if s. 70 could be regarded as a mere enactment not embodying any agreement of the parties but in its nature compulsory, it is clear that it definitely provides for the protection of the respondents (the owners) that the acquisition is to be on the terms specifically set out therein. It would be contrary to all principle to construe the general Act of 1919 as superseding specific provisions of this sort with regard to particular lands introduced for the protection of the owners. The Act of 1919 applies for the modification of the machinery of purchase under a general authority to acquire compulsorily; it does not and it cannot apply where the alleged authority to acquire compulsorily was given upon special terms for the protection of the owners inconsistent with the application of the procedure and rules of the general Act of 1919.

In my opinion this appeal ought to be dismissed with costs.

VISCOUNT CAVE. My Lords, I agree that this appeal fails, and on two grounds.

In the first place, s. 1, sub-s. 1, of the Acquisition of Land (Assessment and Compensation) Act, 1919, has no application except in cases where land is "authorised to be acquired compulsorily" by a Government Department or a local or public authority; and in my opinion the land here in question did not come within that description. It is true that, if s. 62 of the Blackpool Improvement Act, 1917, had stood alone, the corporation would have had authority to take the land either by agreement or, failing agreement, then by the exercise of the compulsory powers contained in the Lands Clauses Act; but that section did not stand alone. It was followed by s. 70, which, doubtless giving effect to an agreement between the parties, put the owners and the corporation in the position of vendors and purchaser of the land at a price to be determined by arbitration and subject to some very special conditions (not appropriate to a compulsory purchase) as to the use of the land purchased, access to adjoining property and other matters. Taking the sections together it appears to me that, in the case of this particular land, the corporation was not authorized to acquire it compulsorily, but was put under an obligation to acquire it on terms agreed to and embodied in the statute of 1917, and accordingly that the Act of 1919 had no application.

But even if it were otherwise, and if it could be said that the land was "authorised to be acquired compulsorily," it would still, in my opinion, stand outside the Act of 1919. The rule is clear that a general statute will not, in the absence of clear words, be construed as derogating from special provisions in a previous statute. Generalia specialibus non derogant, and when the Legislature has given its attention to a particular subject and made provision for it, the presumption is that a subsequent and general enactment is not intended to interfere with the special provision unless the intention so to do is clearly manifested (see the rule as stated by Lord Hobhouse in *Barker* v. *Edger*.(1)) In the present

(1) [1898] A. C. 748, 754.

case the Act of 1917 was a private Act and contained in s. 70 very special provisions as to the terms upon which this land should be sold and purchased, including provisions as to the ascertainment of the price, the payment of interest from a fixed date, the future use of the land, and the form of the conveyance. If the Act of 1919 is to be applied, these special provisions will be seriously affected and the purchase money payable under the earlier Act will be substantially reduced; indeed one purpose of the Act of 1919, and particularly of the rules for the assessment of compensation contained in s. 2 of that Act, is to reduce the compensation payable on a compulsory purchase. It cannot be supposed, in the absence of very clear expressions, that the Legislature in passing the Act of 1919 intended so seriously to alter, to the prejudice of the vendors, the bargain into which they entered in 1917 and which was embodied in the provisions of the Act of that year—a bargain without which that Act might never have been passed. It appears to me that the rule above referred to applies to this case, and that the decision of the Court of Appeal is right on this ground also.

Lord Shaw of Dunfermline. My Lords, I agree.

But, my Lords, I have not reached that agreement without experiencing a very grave doubt; and I will explain to the House frankly how my doubt arises.

In a passage in the judgment of Atkin L.J. he refers to the case of *Barker* (1) in the Privy Council and to the general maxim Generalia specialibus non derogant. After grave consideration I am of opinion that that maxim has no application whatsoever to the present case. I think it is so on account of the particular language of the Act of 1919 itself. By s. 1, sub-s. 1, it is provided that "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority," and then certain provisions follow.

My Lords, I cannot meet the specific language of that statute by a general maxim. It overturns the maxim by its own terms. The statute is passed for the purpose of derogating not only from the procedure in the Lands Clauses Acts and the Railways Clauses Acts, but from the procedure in every special Act which has adopted those general statutes, and in so far as this Act applies it is meant to "derogate," and it is meant to substitute new procedure with consequential remedies and rights according to the new and not according to the old particular Acts.

---

(1) [1898] A. C. 748.

Therefore the only question that remained to my mind was—entertaining that doubt as to the ground of the judgment—what was the scope of the Act of 1919; and that, I think, is the sole question which we have now to determine. But when I come to consider that, my Lords, my doubts are resolved, because I hold that upon a sound and fair construction of the words, "where land is authorised to be acquired compulsorily," what was done in the transaction in Blackpool in 1917 was not looked upon in the light of a compulsory taking. I look at s. 62, for instance, of the Act of 1917, and I contrast it with s. 70 of that Act, and I find clearly in this latter section what is the ratification and nothing but the ratification of an antecedent concluded bargain between two parties, the undertakers (the corporation) on the one hand, and the willing seller, the Starr Estate Co., on the other. In those circumstances, my Lords, I cannot bring my mind to conceive that when the statute of 1919 purported to affect only lands acquired compulsorily by statute it meant to affect a transaction such as that in 1917 at Blackpool covered by s. 70.

I rest my judgment upon the specific limitation in the language of the Act of 1919 itself. I say it again, and I wish it to be fully understood, that in my opinion the Act of 1919 was a derogating Act, was meant to be a derogating Act, was meant to invade, to modify and, if necessary, to repeal all existing codes which should interfere with the provisions of the Act of 1919; but, so reading it, I find it applies to specific cases of compulsory acquisition, of which in my opinion the Blackpool case was not one.

H. L. (E.)
1921

BLACKPOOL CORPORATION v. STARR ESTATE CO.

LORD PHILLIMORE. My Lords, if the Blackpool Improvement Act of 1917 had ended at clause 67, and clause 70, with the other clauses of a similar description, had been added by subsequent legislation or been the product of some agreement between the Blackpool Corporation and the owners of the lands affected, it might be reasonable to contend that, notwithstanding subsequent legislation or subsequent agreement, the matter came within the provisions of clause 1 of the Acquisition of Lands Act, 1919, as being a case where by or under any statute (whether passed before or after the passing of this Act) land was authorized to be acquired compulsorily by a local authority.

But your Lordships cannot divide the Blackpool Act in that way. Its several clauses became law at one and the same moment when the Act received the Royal Assent on August 21, 1917. And they must be treated as parts of one instrument and reconciled if possible. The explanation of the appearance of clause 70 and its companions, and their juxtaposition with clause 62, is not far to seek, but for the present it may be put aside as immaterial.

For the present decision your Lordships can deal merely with the Act as it stands. In clause 62 were comprised (inter alia) the lands for which special provision is made in clause 70; and no doubt by clause 62 authority is given to the Blackpool Corporation to acquire those lands, which the corporation could only do by parliamentary authority or with a licence in mortmain; and authority is also given to the corporation to pay for the acquisition, which it certainly could not do without the sanction of Parliament. For this purpose the authority is general and applies to all the lands comprised in clause 62. The authority extends further to enable the corporation to acquire lands by the exercise of compulsory powers where such compulsory powers are needed. But for the lands comprised in clause 70 no such compulsory powers are needed, and therefore none are given by clause 62. This is, my Lords, I think, the reasoning upon which Younger L.J. based his judgment, with which I venture to express my concurrence.

If your Lordships were driven to a more violent course it would be possible, and in the circumstances necessary, to say that if the two clauses 62 and 70 were to any extent in conflict, the special provisions of clause 70 must be read as derogating from the general provisions of clause 62. But for the reasons I have already given an easier course may be taken.

The most powerful argument against this conclusion rests upon the form of clause 70. It is said that notwithstanding the peculiar nature of the provisions in clause 70 the machinery of the Lands Clauses Act as modified by the particular Act is intended to be set in motion, and that the lands must be deemed to be acquired compulsorily within the meaning of the Act of 1919. There is a notice to treat; the price is to be determined by arbitration in the same way as in the case of lands acquired compulsorily under the Blackpool Act; and there is a further reference to the Lands Clauses Act in sub-s. 10.

I think the answer to this is to be found in a closer analysis of the special provisions. On the one hand, there is no option for the promoters of the Act to acquire or not to acquire the lands in question. The corporation must acquire, and, subject to a defeasance by mutual agreement, the property, if it does not pass immediately, must pass at latest by a day named. And if the price is not yet fixed, provision is made for its determination; while, under sub-s. 10, provision is made for the form of the conveyance.

On the other hand, a matter which is important to the corporation in two ways is left to their option. That is the time, within the limits of the fixed term, at which it will acquire the property. It is not bound to take at once and find the money at once. And the value is, I take it, to be ascertained as of the date when it does acquire—a circumstance of great importance, for the value of urban or suburban lands such as these will vary with the growth or decay of Blackpool; and all values during the period of the war and since are notoriously fluctuating when expressed in terms of currency.

Now, it seems to me that, if not the only, the most convenient procedure for effecting this purpose was the adoption of the machinery provided by the Lands Clauses Act, and that it would be converting questions of form into questions of substance were we, by reason of the show or appearance of the legislation, to treat this as a case of lands which were acquired by compulsion.

One other consideration I should mention. By clause 65 the powers of the corporation for compulsory purchase are to cease at the end of five years from the passing of the Act. But the notice to treat under clause 70, upon which the acquisition of the lands in question will follow, may be given at any time within a period of three years after the termination of the war—an uncertain date which might easily be a much later one than that assigned for the exercise of the compulsory powers.

If your Lordships adopt a construction which does reconcile clauses 62 and 70 it is unnecessary to rely upon any other ground put foward by the respondents.

But I should observe that though no doubt the Act of 1919 was intended to deal retrogressively as well as prospectively with local Acts such as the Blackpool Act, it would be with the utmost reluctance that any Court would construe the general language of the Act of 1919 as repealing such special provisions "for the benefit and protection of private owners and their estate" as those contained in clause 70.

I agree that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 8, 1921.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for D. L. Harbottle, Town Clerk, Blackpool.*

Solicitors for the respondents: *Lewin, Gregory & Anderson, for Finch, Johnson & Co., Blackpool.*

Followed. Pearson v.
Lambeth B.C.
[1950] 2 K. B. 353

[HOUSE OF LORDS.]

H. L. (Sc.)*
1921
Nov. 18.

CORPORATION OF THE CITY OF GLASGOW . . . . APPELLANTS;

AND

TAYLOR . . . . RESPONDENTS.

Negligence—Botanic Gardens—Public Park—Poisonous Shrub—Child eating poisonous Berries—Liability of Proprietors and Custodians of Public Gardens.

The father of a boy, aged seven, who died from eating the berries of a poisonous shrub growing in some public gardens in Glasgow, sued the Corporation as the proprietors and custodians of the gardens for damages for the death of his son. The pursuer averred that on a piece of fenced ground in the gardens the defenders grew, among other specimen plants, a shrub bearing poisonous berries which presented a tempting appearance to children; that this enclosed piece of ground was open to the public, access thereto being by a gate which could be easily opened by young children, and was in a part of the gardens much frequented by children; that the pursuer's son, with some other children, entered the gardens and ate some of the berries of this poisonous shrub and died; that the defenders knew that these berries were a deadly poison, but took no precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so; and that there was no adequate notice in the gardens warning the public of the dangerous character of the specimen shrubs growing therein:—

Held, that the pursuer's averments disclosed a good cause of action against the defenders, and that the action ought to proceed to trial.

Cooke v. *Midland Great Western Railway Co. of Ireland* [1909] A. C. 229 applied.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary.

The respondent brought an action against the appellants, the Corporation of Glasgow, for damages for the death of his son who died as the result of eating the berries of a poisonous shrub growing in the Botanic Gardens, Glasgow. These gardens were open to the public as a public park and were under the management and control of the appellants.

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD WRENBURY.

The question raised by the appeal was whether the facts averred by the respondent in his condescendence disclosed any ground of liability against the appellants.

The following summary of the pursuer's averments is taken from the opinion of Lord Atkinson: "It is averred in the first condescendence that on the 20th of August 1919 the pursuer's son, aged seven years, proceeded with some other young children to the playground in these gardens, which playground surrounds a bandstand; that this part of the gardens was, as the defenders well knew, much frequented by young children. In the third condescendence it is averred that, on this 20th of August 1919, and for some time prior thereto, the defenders had growing, upon a small piece of ground adjoining this playground, specimen plants and shrubs of various kinds, including a shrub named Atropa Belladonna, bearing berries rather similar in appearance to small grapes, and presenting a very alluring and tempting appearance to small children; that this plot of ground, which was enclosed by a wooden fence, was open to the public, access being obtained to it by a gate in this fence, and was, as the defenders well knew, frequented by members of the public of all ages. It is in this condescendence admitted that there is a wire loop on this fence which may be passed over the end of the gate, and it is explained that the gate and fence are only 3 feet in height; that the gate is a light and rustic one which, even when held in position by the wire loop, could easily be opened by a child of tender years. In the fourth condescendence it is averred that on the 20th August 1919 this belladonna shrub was about 5 feet in circumference, that it overhung the adjoining walk, though not the adjoining fence, that there are a number of paths in the enclosed piece of ground, and that the pursuer's son was attracted while passing the place by the beautiful and tempting appearance of this shrub, which was covered with the berries described; that he picked a few of these berries and ate them, that he shortly afterwards became ill and, though he received medical attention, died the following morning. In the fifth condescendence it is averred that in a well-known book on botany it is stated that the attractive character of these berries, looking, as they do, to the uncritical eyes of young children, like cherries, or big black currants, has led to many serious accidents; that the poisonous character and inviting and deceptive appearance of these berries were well known to the defenders and their servants; that they knew, or ought to have known, if they had exercised reasonable supervision, that this belladonna shrub was growing in a conspicuous position in their gardens, on a part open to and much frequented by children; that it was probable, indeed practically certain, that children would be tempted and deceived by the appearance of the shrub and would eat its berries, which have a sweet taste; that the defenders and their servants knew, or ought to have known, that these berries were a deadly poison, and that if one or two of them were eaten by a child it was certain to cause dangerous illness likely to result in death; that the defenders did not take any precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so. In the sixth condescendence it is averred that there was no adequate notice of any kind in these gardens warning the public of the poisonous or dangerous character of these specimen shrubs growing therein."

The Lord Ordinary (Lord Hunter) held that the facts averred by the pursuer disclosed no cause of action against the appellants and dismissed the action.

The Second Division, by a majority (the Lord Justice Clerk, Lord Dundas, and Lord Ormidale; Lord Salvesen dissenting) recalled the interlocutory of the Lord Ordinary and approved an issue for the trial of the action.

1921. July 26. *Condie Sandeman K.C.* of the Scottish Bar (with him *A. Gilchrist* (of the Scottish Bar) and *W. Kerr Chalmers* (of the English Bar)) for the appellants. The averments in the condescendence are not relevant. It is common

H. L. (Sc.)
1921
GLASGOW CORPORATION
v.
TAYLOR.

knowledge that many poisonous plants are grown in public gardens and that the eating of the fruit of these plants by children may result in death or injury. Any danger arising from the existence of such plants is obvious and is as well known to the public as to the custodians of the gardens. This danger is in the same category as the danger arising to children from unfenced sheets of water which form a feature of many public parks. The danger of carelessly approaching these is obvious to adults but is not appreciated by children. Such sheets of water are attractive to children but it has never been held that there is any duty in law to fence them. The corporation are bound to make the gardens safe for persons of average intelligence but are not bound to ensure the safety of children against risks arising solely from their own childishness and helplessness. They are bound to protect the public resorting to the gardens against hidden dangers but that is the limit of their duty. They were reasonably entitled to assume that the parents or guardians of children resorting to the gardens would either accompany them there or warn them against eating any of the plants found therein. This case falls within the principle of *Hastie* v. *Edinburgh Magistrates* (1) and *Stevenson* v. *Glasgow Corporation.* (2)

[He also referred to *Campbell* v. *Ord and Maddison* (3); *Lynch* v. *Nurdin* (4); *Latham* v. *R. Johnson and Nephew, Ld.* (5); *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (6)]

MacRobert K.C. (of the Scottish Bar) and *Arthur P. Duffes* (of the Scottish and also of the English Bar) (with them *Dewar Gibb* (of the Scottish and also of the English Bar) for the respondent. It is suggested that the corporation owe no special duty to children as distinguished from adults, but the legal responsibility of owners and custodians of property towards the public using that property varies with circumstances. The true rule is laid down by Lord Atkinson in *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1)—namely, that the duty which the owner of premises owes to the persons whom he permits to enter upon them must be measured by his knowledge, actual or imputed, of the habits, capacities and propensities of those persons. That rule is peculiarly applicable to the present case. Having provided a playground for children in a public park, a special duty lay upon the corporation to take every precaution to make it reasonably safe for children. Upon this question of a special duty towards children it is material to consider whether the child is on the premises as a trespasser or as a licensee or invitee : *Latham* v. *R. Johnson and Nephew, Ld.* (2) This child being in the park as of right, the corporation owed a direct duty to it. In determining the measure of the corporation's liability the quality of the danger is a material factor. *Stevenson's Case* is distinguishable because the danger in that case was obvious. Where there is any special or unusual danger which is known or ought to be known to the proprietor of the premises, any person lawfully using those premises is entitled to expect that the proprietor will take reasonable precautions to guard against that danger. The duty of custodians of property to anticipate the thoughtlessness and mischievous propensities of children has been recognized in a series of cases, which are referred to in *Cooke's Case* and *Latham's Case.*

---

(1) 1907 S. C. 1102.
(2) 1908 S. C. 1034, 1038, 1045.
(3) (1873) 1 R. 149.
(4) (1841) 1 Q. B. 29.
(5) [1913] 1 K. B. 398, 405.
(6) [1909] A. C. 229.

Assuming that the corporation were justified in growing poisonous shrubs at all in close proximity to a children's playground in a public park, they should have given warning of the danger by putting up a notice and have placed obstacles in the way of children having access to the danger. This danger was aggravated by the fact that the berries in question were attractive to children and pleasant to the taste, so that for children the danger was of the nature of a trap. Upon the facts averred the respondent has made out a case to go to the jury : *Reilly* v. *Greenfield Coal and Brick Co.* (3)

(1) [1909] A. C. 229, 238.
(2) [1913] 1 K. B. 398, 410.
(3) 1909 S. C. 1328, 1336-7.

Condie Sandeman K.C. in reply referred to *Crowhurst* v. *Amersham Burial Board* (1) and *Ponting* v. *Noakes* (2) (the yewtree cases).

The House took time for consideration.

1921. Nov. 18. Lord Buckmaster (read by Lord Shaw of Dunfermline). My Lords, it would have been less easy to find the correct pathway through the difficulties which this case presents were it not that the road has already been travelled by learned judges who have left clear and definite signposts by which to guide our feet. I do not propose to leave the beaten track thus pointed out, and shall content myself with saying that, according to these directions, which are in my opinion correct, this appeal ought to fail. The case arises on a plea in law raised by the defenders, who asserted that the averments in the pursuer's condescendence were irrelevant and insufficient to support the conclusions of the summons, and that the action should be dismissed. The Lord Ordinary sustained this plea, but the Lords of the Second Division recalled his interlocutor and approved the issue proposed by the pursuer. From that judgment the present appeal is brought.

The case, as alleged in the pursuer's condescendence, is this: that the Botanic Gardens of Glasgow were a public park open to the public and in the custody of the defenders, the Glasgow Corporation. On a small piece of fenced ground in the gardens the appellants grew, among other botanical specimens, a shrub known as Atropa Belladonna, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children, and according to the pursuer's allegations the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children

---

(1) (1878) 4 Ex. D. 5.

(2) [1894] 2 Q. B. 281.

BIBL. LONDIN UNIV.

would be tempted and deceived by the appearance of the shrub and would eat the berries. The knowledge that these berries were poisonous was also said to be possessed by the defenders. The pursuer's child, a little boy of seven, ate some of these berries and, in consequence, died. The question is whether the allegations before mentioned establish a cause of action by the father to obtain the money reparation for his affliction which the law of Scotland permits.

The important facts that must be borne in mind in forming a conclusion on this matter are, first, that the children were entitled to go to the spot where the shrub was grown; secondly, that there was no warning giving parents and those who had the custody of children any knowledge of the danger; thirdly, that the danger was known to the appellants.

In the case of *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1), Lord Atkinson states the principle applicable to such a case in terms which are, in substance, repeated by Lord Sumner in *Latham* v. *R. Johnson and Nephew, Ld.* (2) Lord Sumner there says: "The presence in a frequented place of some object of attraction, tempting 'a child' to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness of the peril of the object."

I can see no distinction between the conditions that are there postulated and those that obtain in the present case. How the questions of fact will be ultimately resolved is a matter for the jury before whom the case will be heard, but the condescendence alleges in plain terms all the essential conditions summarised by Lord Sumner. To the same effect also is the opinion of Lord Macnaghten, in the case of *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (1) With regard to the cases of *Hastie* v. *Edinburgh Magistrates* (3) and *Stevenson* v. *Glasgow Corporation* (1), both of which related to danger by water, the one of a pond and the other of a river, it is sufficient to say that the element of mistake and deception which is undoubtedly involved in the present case did not, and could not, arise. Here the children had, according to the allegations, placed within their reach something which they were tempted to eat, and to eat was the certain prelude to sickness and the probable precursor of death.

---

(1) [1909] A. C. 229.
(2) [1913] 1 K. B. 398, 416.
(3) 1907 S. C. 1102.

LORD ATKINSON. My Lords, in this case the pursuer claims to recover from the appellants a sum of 500*l.*, together with a sum of 100*l.* for expenses, as a solatium for the loss of his son, a boy of seven years of age, who was poisoned by eating berries of an Atropa Belladonna shrub which grew in the Botanic Gardens, Glasgow, of which gardens the appellants are the proprietors and custodians.

The appellants are bound to permit, or do in fact permit, their gardens to be used as a public park open to all members of the public, including even those of the immature age of seven years, though these latter should be unattended by persons capable of taking care of them. The question for decision upon this appeal is, as I understand it, this : whether, if the averments contained in the pursuer's condescendences were proved or admitted, they would prima facie establish the cause of action upon which the pursuer relies.

The question resembles that which would, under the English practice, arise upon a demurrer to a statement of claim. [His Lordship stated the pursuer's averments and continued :]

It was not disputed that the unfortunate child who lost his life was in these gardens on August 20, not merely as a licensee but as of right. It was not even suggested in argument that the child could by himself have ascertained the true nature and character of this shrub. Your Lordships' attention was called by Mr. Sandeman to s. 37 of the Glasgow Public Parks Act, 1878 (41 & 42 Vict., c. lx.), which reads as follows :—"The Lord Provost, Magistrates, and Council may from time to time make such byelaws as they shall think fit for the good government and regulation of the said public parks, gardens, and open spaces, and of the museums, galleries, and collections of natural history, science and art, and other buildings, and persons frequenting the same, and of the superintendents, curators, rangers, parkkeepers and other officers or servants appointed and employed by them. . . . ." The forty-first section of this statute provides for the publication and posting in the park of these byelaws when made. It was admitted, however, that no byelaws of the kind mentioned were ever made. The appellants must be taken, I think, to have assumed the responsibility, whatever it was, of this omission.

---

(1) 1908 S. C. 1034.

The question then for decision is, if the relevant averments of fact contained in these several condescendences be taken as true, which for the purposes of this appeal I understand they must be, do they establish that a duty lay upon the defenders to take reasonably adequate precautions to protect on August 20, 1919, the pursuer's son from the danger by which the child lost his life ?

In my opinion that question should be answered in the affirmative. If so, it is not contended that the duty was discharged. They did nothing to protect the child, and contend they were not bound to do anything. There is, in my view, no resemblance between this case and those cases where mischievous boys sustain injury by interfering with or misusing natural objects, such as trees in public parks up which they may be tempted to climb, or water, ornamental or other, into which they may accidentally fall or be tempted deliberately to enter. The appearance of such objects as these is well known and unmistakable. There is nothing deceptive or misleading about them. They cannot well be mistaken for things other than, or different from, what they really are. Whereas, if the averments in the condescendences be true, there was in this belladonna plant, with the deadly berries which it bore, something in the nature of a trap. The berries looked alluring and as harmless as grapes or cherries.

It is averred that the defenders and their agents knew this, and also knew—which the deceased child did not—that the berries were, if eaten, highly poisonous. The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

Many authorities are dealt with in the able judgments delivered by the learned judges in the Second Division of the Court of Session. They have also been cited in argument before your Lordships on the hearing of this appeal. I only think it necessary to refer to a few of them, but particularly to *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1) and *Latham* v. *R. Johnson & Nephew, Ld.* (2)

The decision of this House in the first of these two cases has, no doubt, been frequently criticised. I am familiar with the criticisms, and have noticed that in them not unfrequently either no weight or not full weight is given to the vital fact that there was evidence there to go to the jury from which they might reasonably conclude that the children mentioned in that case not only entered upon the lands of the company with its leave and license, but also played upon the dangerous machine, the turntable, they found there, with that very same leave and license. That is the feature of the case dwelt upon by Lord Macnaghten in the passage of his judgment where he says (3): "The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turn-table, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred ?" I emphasize the words "playing with the turntable."

---

(1) [1909] A. C. 229.

(2) [1913] 1 K. B. 398.

(3) [1909] A. C. 234.

Lord Collins says (1): "I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it; and that, situate as it was in such a conspicuous place, and frequented so largely by young people without remonstrance by the defendants, with easy access from the Bridge Road through a gap in the hedge and along a well-trodden path down the embankment, it could hardly fail to present an irresistible attraction to young persons. I think all these facts in combination were evidence from which a jury might well infer not merely a license, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence."

And I, myself, after referring to the question which would arise in a case where the boys or children were trespassers, proceeded to say (2): "In the view I take it is not necessary to determine that question in the present case, because I think there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable—a most important addition—with the leave and licence of the defendant company." Such were the real facts and the real question decided in *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (1)

Questions as to the liabilities of those who place on the public street, or other place which children of tender years have a right to frequent, and do in fact frequent, things—whether machinery or others, tempting and alluring in appearance to young children unable to take care of

---

(1) [1909] A. C. 241.

(2) Ibid. 239.

H. L. (Sc.)
1921
GLASGOW CORPORATION
v.
TAYLOR.
Lord Atkinson.

themselves, yet to the knowledge of those who placed them there most dangerous to children yielding to this temptation are different questions from those decided in *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (1)

The principle applicable to these latter questions is, I think, clearly stated by Lord Denman C.J., in his judgment in *Lynch* v. *Nurdin.* (2) In that well-known case the defendant negligently left his horse and cart unattended in the public streets. The plaintiff—a child of seven—got into the cart in play. Another child incautiously led the horse on, and the first child, the plaintiff, was thereby thrown out and hurt. It was held that the defendant was liable in an action on the case, though the plaintiff was a trespasser, not upon the street, where he had a right to be, but upon the tempting thing the defendant had left unguarded in the street—the cart. In giving judgment Lord Denman C.J., said: "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged in the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation." I do not think Lord Denman would have had much difficulty in dealing with *Lynch* v. *Nurdin* if there had been evidence to go to the jury that the child had got into the cart with the leave and license of the owner of it.

It would appear to me that every word of this passage of Lord Denman's judgment applies to the present case. The child in the present case was of right in the gardens, as the child in that case was of right in the public street. The defendants planted and maintained in the garden, near the playground, which children, like the deceased, frequented, a shrub bearing, to their knowledge, berries in appearance alluring and tempting to children, apparently harmless, but deadly poisonous. The deceased child yielded to the temptation which was presented to him. The defenders, if the averments of the condescendences be true, knew of the nature, character, and strength of the temptation, and the dangerous, possibly deadly, result of yielding to it. The deceased child did not know, and could not reasonably have discovered, this latter fact. If one of the servants of the defenders had left unattended in this garden a cart and horse, and the deceased, yielding to temptation, had got into it, had fallen from it, and been killed, his father could have recovered according to the principle of the decision in *Lynch* v. *Nurdin.* (1) I utterly fail to see on what ground he is not equally entitled to recover in the present case.

---

(1) [1909] A. C. 229.

(2) 1 Q. B. 29, 38.

In *Clark* v. *Chambers* (2) Cockburn C.J., after reviewing all the authorities, says: "It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

In *Jewson* v. *Gatti* (3) there was a cellar beside a highway in which painting was going on. A bar was placed round the opening. A passing child naturally looked down to see what was going on, the bar gave way and he fell into the cellar. Day J. non-suited the plaintiff. Lord Esher, in giving judgment, said: "This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected, without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that. For there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into the cellar where the painting was going on. That was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar. The child leant against it and it gave way, and she fell down."

---

(1) 1 Q. B. 29.

(2) (1878) 3 Q. B. D. 327, 339.

(3) (1886) 2 Times L. R. 381, 441.

The case of *Harrold* v. *Watney* (1) approved of and followed in principle *Lynch* v. *Nurdin* (2) on the question of the necessity of taking into account in such cases the propensities of children. The case of *Latham* v. *R. Johnson & Nephew, Ld.* (3), was on its facts, in my view, quite different both from the case of *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (4), and from the present case. The land upon which the injured child had there entered, and where it met with its injury, was the site of some old houses and a wall, which had been pulled down, leaving an open piece of waste ground upon which were heaps of debris. The public were allowed by the defendants to traverse this piece of waste ground, and children were in the habit of playing upon the heaps of debris and other materials deposited there by the defendants. The waste ground did not adjoin the public highway, but was accessible by a path which led from the back of the house in which the injured child lived. On the morning of the day upon which the child was injured, a quantity of paving stones were deposited on this waste ground in an irregular heap. The child, unobserved by anybody, left her mother's house, and a short time afterwards was found sitting on one of the stones with her hand beneath another, by which it was crushed. There was no evidence to show how the accident occurred. The jury found (1.) that the children played upon the land with the knowledge and permission of the defendants; (2.) that there was no invitation to the child to go on the land unaccompanied; (3.) that they ought to have known that there was a likelihood of the children

---

(1) [1898] 2 Q. B. 320.
(2) 1 Q. B. 29.
(3) [1913] 1 K. B. 398.
(4) [1909] A. C. 229.

H. L. (Sc.)
1921
Glasgow Corporation v. Taylor.
Lord Atkinson.

being injured by the heap of stone; (4.) that the defendants did not take reasonable care to prevent the children being injured.

If the jury had found that the heap of paving stones was in the nature of a dangerous machine, and that the child was sitting upon the heap and meddling or interfering with the stones with the leave and licence of the defendants, the case might to a slight extent resemble *Cooke's Case.* (1) While if, on the other hand, the jury had found that the child was on the waste ground as of right, and that heaps of paving stones are so enticing and alluring to children that they were likely to be tempted to sit upon them and meddle with them, the case might have some slight resemblance to the present case; but as the Court of Appeal found (according to the headnote) that there was neither allurement, nor trap, nor invitation, nor dangerous object placed upon the land, I utterly fail to see how the facts of that case resemble those of the present, if the averments of the condescendences be taken as true, which for the purposes of this appeal they admittedly must be.

The liability of defendants in cases of this kind rests, I think, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves, yet inquisitive and easily tempted, into contact, in a place in which they, the children, have a right to be, with things alluring or tempting to them, and possibly in appearance harmless, but which, unknown to them and well known to the defendants, are hurtful or dangerous if meddled with. I am quite unable to see any difference in principle between placing amongst children a dangerous but tempting machine, of whose parts and action they are ignorant, and growing in the vicinity of their playground a shrub whose fruit is harmless in appearance and alluring, but, in fact, most poisonous. I think, in the latter case, as in the former, the defendant would be bound, by notice or warning or some other adequate means, to protect the children from injury. In this case the averments are that the appellants did nothing of the kind. If that be true, they were, in my view, guilty of negligence, giving the pursuer a right of action.

---

(1) [1909] A. C. 229.

For this reason I think the judgment appealed from was right and should be affirmed and this appeal dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, in a discussion, taking place upon the relevancy of the pursuer's averments, the House must, of course, assume that the whole of these averments are true. That is the familiar and settled condition of the argument.

The Articles of the Condescendence are before the House. In the case for the appellants there is so clear and accurate a statement of the contents of these Articles that for convenience sake I insert it here:

"The place and circumstances of the occurrence are described in Articles 2, 3 and 4 of the respondent's Condescendence. In these Articles the respondent avers that on 20th August, 1919, his son, aged seven, with some other young children, proceeded to the Botanic Gardens, Glasgow, which are open to the public as a public park. The children went to the playground surrounding the bandstand there, a part of the gardens which, in the knowledge of the appellants, was and is much frequented by young children. At that date, and for some time prior thereto, the appellants had growing in a small plot immediately adjoining this playground specimen plants and shrubs of various kinds. Inter alia there were specimens of wheat, barley, oats, etc., and also a shrub Atropa Belladonna, bearing berries rather similar in appearance to small grapes, and presenting a very tempting and alluring appearance to children. This plot was enclosed by a wooden fence, and was open to the public, access being obtained by a gate in the fence, fastened by a wire loop. The plot was frequented by members of the public and by students. The gate could be easily opened by a young child. On the date in question, being attracted by the beautiful and tempting appearance of the berries, some of the children, including the respondent's son, entered the plot through the said gate, and picked and ate a few of the berries. Shortly afterwards they became ill, and the pursuer's son died the following morning.

"The respondent further avers in Condescendence 5 that the attractive character of the berries is accurately described in a well-known book on botany as follows :—'The attractive character of the berries, looking as they do, to the uncritical eyes of young children, like cherries or big black-currants, has led to many serious accidents,' and that the poisonous character and the inviting and deceptive appearance of the berries were well known to the appellants and their servants."

I agree with your Lordships that these averments are relevant to be admitted to probation, and if true to infer liability on the appellants for the death of the pursuer's child.

My Lords, this is not a case of trespass. It is only indirectly that the cases of trespass throw light upon the present appeal. According to the averments of the pursuer, his son, aged seven, had a right to go where he was. He had, equally with any other citizen, a right to open the little gate which gave access to the shrubbery containing the poisonous plant. There is no trespass in the case. The child, having a right to be in these gardens, was, in my opinion, entitled, as were also his parents, to rely upon the gardens being left in a reasonably safe condition. Or, in the language of the Lord Justice-Clerk : "The playground for the children must be taken as being provided as a place reasonably suitable and safe for children, and I think the parents were entitled so to regard it."

To this would I venture to add that it matters not that the gardens were, or were called, Botanic Gardens. They admittedly were a public place of recreation to the citizens of Glasgow.

In grounds open to the public as of right, the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited. The two Scotch cases of *Hastie* (1) and *Stevenson* (2) clearly illustrate the distinction. Grounds thrown open by a municipality to the public may contain objects of natural beauty, say precipitous cliffs or the banks of streams, the dangers of the resort to which are plain. In the language of Lord M'Laren in *Stevenson's Case* (3), "I do not doubt that the Corporation, as proprietors, are bound to give reasonable protection to members of the public against unusual or unseen sources of danger, should such exist. But in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures." Lord Dundas very properly, if I may say so, accentuated this consideration in the present case.

When the danger is familiar and obvious, no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other.

Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise. In the case of objects, whether artificial, and so to speak, dangerous in themselves, such as loaded guns or explosives, or natural objects, such as trees bearing poisonous fruits which are attractive in appearance, it cannot be considered a reasonably

(1) 1907 S. C. 1102. (2) 1908 S. C. 1034.
(3) Ibid. 1038.

H. L. (Sc.)
1921

Glasgow Corporation v. Taylor.

Lord Shaw of Dunfermline.

safe procedure for a municipality or owner to permit the exhibition of these things with their dangerous possibilities in a place of recreation and without any special and particular watch and warning. There can be no fault on the part of a parent in relying that such obligations of safety would be duly performed by the municipality or owner; and in allowing his child accordingly to pass into the grounds unattended the parent commits no negligent act. As for the child itself, while it may do things and incur dangers by inquisitively meddling with things it should not touch, it is plain that when the incurred danger—against which no protection or sufficient warning was directed to anybody—produces its unfortunate evil effect, the municipality or owner is answerable for this, and there is no defence of contributory negligence.

Lord Macnaghten made this observation in *Cooke* (1): "It does not seem unreasonable to hold that, if" persons "allow their property to be open to all comers, infants as well as children of a maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves."

The present is a case much stronger than one of tacit permission to resort, and the observation which I have ventured to quote seems to me to apply with singular cogency to the owners or guardians of public property and places of recreation.

I do not find myself able to draw a distinction in law between natural objects such as shrubs whose attractive fruitage may be injuriously or fatally poisonous, and artificial objects such as machines left in a public place unattended and liable to produce danger if tampered with. The act of tampering might be contributory negligence on the part of a grown-up person, but would not be so reckoned on the part of a child. I think the language of Cockburn C.J. in *Clark* v. *Chambers* (2) still remains of the highest authority. I also think that the same principle completely covers the

(1) [1909] A. C. 236.

(2) 3 Q. B. D. 339, set out p. 56, ante.

H. L. (Sc.)
1921
GLASGOW CORPORATION
v.
TAYLOR.
Lord Shaw of Dunfermline.

present case, and that it does not, as I say, make any difference that the object which produced the danger was an artificial machine or a growing shrub. I think there was fault in having such a shrub where it was without definite warning of its danger and definite protection against the danger being incurred. To give such protection was part of the reasonable duty of the corporation, and citizens were entitled to rely upon it having been given.

I have stated the case as I view it without entering upon those points as to allurement or trap which more naturally occur in the leave and licence cases. But I must not be held to dissent in any way from the view that has been taken in regard to that aspect of the case. I might indeed venture to repeat Lord Sumner's language in *Latham* (1) and respectfully adopt it: "The presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object."

I do not desire, my Lords, to close my opinion without stating that I attach my express concurrence to the statement of my noble and learned friend Lord Atkinson in regard to the true scope and effect of *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (2)

LORD SUMNER. My Lords, that this case must go to trial there can be no doubt. It was admitted by counsel for the appellants that the child had a right to be in the park where the bush was. If so, and if the pursuer can prove his allegations, the case would fall within the principle of *Lynch* v. *Nurdin.* (3)

How the right arose was not explained. Under their Act the defenders could have, but had not, made byelaws for the regulation of the park, so as to affect this case. Perhaps the section would not justify under the name of regulation total prohibition of the entrance of infants, even if public opinion would tolerate it. Perhaps a regulation that a child must be and remain in the charge of some responsible person, as a condition both precedent and subsequent to its admission, would not be worth much in itself and a jury might find that, being often evaded, it had been waived. On the other hand, the admission may have meant no more than that the child was not doing wrong in being in the Botanic Gardens, having an unconditional leave and licence from the defenders. Be this as it may, for present purposes I think the admission must go to its full extent. As, however, it is an admission only, nothing is decided as to the rights of any other case in accepting it, and nothing prevents the nature of the admitted right from being further examined, if necessary, at a later stage of this case. The position, therefore, I take to be, that the child had a right to be in the part of the park where the defenders had a right to grow their bush, and the law has to place the exercise of each of these two rights in a just relation to that of the other. The child had no right to pluck the berries, but the corporation had no right to tempt the child to its death or to expose it to temptation regardless of consequences. The question is therefore one of the relative duties of care between the corporation and the child, when each was exercising a right and neither right was, as such, subordinated to the other. Nothing, I think, turns on the fact that the corporation's right arose out of ownership of the soil and the child's did not. It would have made no difference in *Lynch* v. *Nurdin* (1) if the cart had belonged to the road authority and the careless carter had been its servant, or if the soil of the road had belonged to the infant and the cart had been there in the exercise of a public right of way.

---

(1) [1913] 1 K. B. 416.

(2) [1909] A. C. 236.

(3) 1 Q. B. 29.

Further elaboration of the case at this stage is needless and perhaps undesirable. I think I can probably be of more service if I indicate what, in my opinion, your Lordships' decision does not involve than what it does. We are not

(1) 1 Q. B. 29.

H. L. (Sc.)
1921
Glasgow Corporation v. Taylor.
Lord Sumner.

dealing with trespassers or with licensees or with invitees, as such. Nothing is laid down as to the duty of private landowners towards such persons; nothing as to any general duty to erect fences, or to alter the natural features and state of private lands; nothing as to safeguarding at all hazards any children found thereon; nothing as to seen dangers or as to places in which the presence of children is not to be expected. Such cases must be discussed in the light of other decisions appropriate to them.

At the bar some argument arose as to the pursuer's own responsibility in respect that he either had not effectually taught the child not to take what did not belong to it, or that he had not caused it to be in charge of some one able to take care of it, while in the defenders' park. In some previous cases these points have been spoken of as going to the measure of care which the defenders owed to the child, so that the child would be entitled to no greater care than an adult: *Stevenson* v. *Corporation of Glasgow*, per Lord Johnston. (1) The same learned judge in *Reilly* v. *Greenfield Coal and Brick Co.* (2) speaks of a parent's negligence being the same, whether, as tutor-in-law for the injured infant, he sues to recover for it damages for injury or in his own right seeks to recover solatium for himself, and he adds that such negligence is "attributable vicariously to the child." Lord Ardmillan in *Grant* v. *Caledonian Ry.* (3) regards the age of the infant as unimportant, for either the child was able to take care of itself or, if not, it should have been taken care of by its parents. The parent's obligation has often been stated as being a material matter, e.g., by Alderson B. in *Lygo* v. *Newbold* (4) and by Lords Kinnear and Salvesen in *Hastie* v. *Edinburgh Magistrates* (5); see also *Davidson* v. *Monkland Rys. Co.* (6) It is evident that these propositions, though much alike, are not really identical. The child's own contributory negligence, in the true sense of the term, is for the defender to prove; so, it would seem, is the parent's. In the former case it must be direct, or not remote; in the latter it is not easy to see, apart from cases where the parent's negligence is continuing, so as to constitute a joint cause of the injury concurrent with the negligence of the defender, why the neglect to have the child better taught or to keep it in charge of a competent person is not too remote to be a contributory cause of the accident. On the other hand, if the child's inability to take care of itself is part of those circumstances which define the defender's obligation of care, it is the pursuer who should prove it. Again, if the true proposition is that a parent can only sue for solatium in his own right where he can show that he has satisfied the condition precedent of having taken all reasonable precautions to protect the child from the consequences and risks of its own childishness, it is for him to prove the fulfilment of this condition; but what if the person provided, though proper, is careless, and what if the accident would have happened all the same, whether such a person was provided or not? If the parent, who presumably knows all about his child, did not anticipate risk enough to require that the child should not go alone, can it be negligence in the defenders, who do not, to take no precautions for their part in view of the possible tender age of the visiting child? If so, the matter is one to be raised by the defenders. Again, the pursuer no doubt owes a duty to his child, but what is the duty to be careful of the child which he owes to the defenders, as distinct from mere conduct on his part qualifying him to recover his own solatium? The former duty the defenders would have to prove; the latter, as part of his own qualification, must be proved by the pursuer. I confess that, in view of such opinions as I have cited, the law on this point, in actions brought by the parent for the loss of his child, does not seem to me to be settled or even to be simple. If a parent sues because he is bereaved, what if it appears that, if he had done his parental duty, no harm would have come to the child, and he would not have been bereaved at all? Is the matter merely one of cause and effect? If a parent's neglect of that duty is not a cause but at most a sine qua non of the child's death, who then in law has caused the child's death? I offer no opinion on any unsettled question. All that I desire to make quite clear is, that, although these matters were discussed in the Court below, and to some extent also at your Lordships' bar, none of them have arisen for decision at this stage of the case, but they remain open, if it becomes necessary to raise them later on.

---

(1) 1908 S. C. 1036.
(2) 1909 S. C. 1328, 1334.
(3) (1870) 9 M. 258, 264.
(4) (1854) 9 Ex. 302.
(5) 1907 S. C. 1102.
(6) (1855) 17 D. 1038.

The position is the same as to the age of the child. The question whether it was or was not capable of contributory negligence on its own part, just as the question whether the parents are or are not guilty of contributory negligence, in fact is untouched. It was contended before the Court of Session that a child has in such matters as this a separate and distinct right in regard to the care that is due to it; "that there is a recognised difference in law between the duty of public authorities to a child and to an adult" (58 S. L. R. 160). This is not really a correct statement. Where a question as to the care to be used arises between persons using as of right the place, where they respectively act, infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations.

I think the appeal fails.

LORD WRENBURY. My Lords, I concur.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 18, 1921.

Agents for the appellants: *Martin & Co., for Sir John Lindsay, Town Clerk, Glasgow, and Campbell & Smith, S.S.C., Edinburgh.*

Agents for the respondent: *Faithfull, Owen, Blair & Wright, for Paterson & Ross, Writers, Glasgow, and Arch. Menzies & White, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* OWNERS OF S.S. HAUGLAND . . . APPELLANTS;

1921

Dec. 5.

AND

OWNERS OF S.S. KARAMEA . . . . RESPONDENTS.

ET E CONTRA.

Ship—Collision—Crossing Rules—Apportionment of Blame—Regulations for Preventing Collisions at Sea, 1897, *arts.* 19, 21, 28—*Breach, whether contributing to Collision—Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 4, *sub-s.* 1.

Two steamships, one, the K., outward bound and the other, the H., inward bound, were, whilst approaching by night the Whistling Buoy which lies off the entrance to the channel to Monte Video, on crossing courses, the K. having the H.'s green light open on her port bow. Accordingly, under arts. 19 and 21 of the Regulations for Preventing Collisions at Sea, it was the duty of the K. to keep her course and speed, and of the H. to keep out of the way. When the vessels were nearly two miles apart the H. ported 3½ points, but did not blow a helm signal as required by art. 28. The K., when she got the Whistling Buoy abeam, starboarded to get to her course out to sea, and the H. failed to stop and reverse with the result that the two ships came into collision.

Hill J. held that both vessels were to blame and apportioned three-fourths of the blame to the K. and one-fourth to the H., but the Court of Appeal held that the blame should be apportioned equally:—

Held, that both vessels were to blame, the K. for not keeping her course and the H, for not stopping and reversing, and also for not giving the appropriate signal on the whistle when she began to port, it not being proved that the vessels were too far apart for the whistle to be heard, or that the breach of art. 28 was not a contributory cause of the collision; and that the blame should be divided equally.

Decision of the Court of Appeal [1921] P. 76 affirmed.

APPEAL and CROSS-APPEAL from an order of the Court of Appeal (1) varying a judgment of Hill J. (2)

The appeal was heard with nautical assessors.

The litigation arose out of a collision which occurred between the Norwegian steamship *Haugland* and the British steamship *Karamea.*

The facts are stated in the report of the case before the

---

* *Present:* VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

(1) [1921] P. 76.

(2) [1920] P. 314.

Court of Appeal and sufficiently appear from the judgment of Viscount Finlay.

Hill J. held that the *Karamea* was to blame for not keeping her course in accordance with art. 21 of the Regulations for Preventing Collisions at Sea, and that the *Haugland* was to blame for not immediately reversing her engines, but he did not blame the *Haugland* for omitting to whistle as required by art. 28 when she first ported, as he thought that the ships were then too far apart for the whistle to be heard. In the result he apportioned three-fourths of the blame to the *Karamea* and one-fourth to the *Haugland*. The Court of Appeal (Lord Sterndale M.R., Warrington and Scrutton L.JJ.) agreed with Hill J. that both vessels were to blame, but thought that the *Haugland* was further to blame for not blowing her whistle, and they apportioned the blame equally.

The owners of the *Haugland* claimed that the *Karamea* alone should be held to blame, or, alternatively, that the judgment of Hill J. should be restored. The owners of the *Karamea* by their cross-appeal claimed that the *Karamea* should be pronounced free from blame.

1921. Nov. 3, 4, 7. *Butler Aspinall K.C.* and *Stephens K.C.* (with them *Dumas*) for the appellants. The real cause of the collision was the continuous starboarding of the *Karamea*, the stand on ship. The attempt of the *Haugland* to avoid the collision in the moment of danger by going full steam ahead instead of by stopping and reversing was possibly an error of judgment, but was not negligence. Assuming that both ships were to blame, the Court of Appeal were not justified in blaming the *Haugland* for not blowing her whistle to indicate her course when she began to port in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, because that failure did not contribute to the accident, inasmuch as the distance between the ships was such that the whistle could not possibly be heard, and the trial judge so found. A breach of the Collision Regulations which does not contribute to the collision is not at the present day to be taken into consideration, though the law was formerly different: Maritime Conventions Act, 1911, s. 4; *The Peter Benoit* (1); Marsden's Collisions at Sea, 7th ed., p. 147. The exercise of the discretion of the trial judge in apportioning the blame ought not lightly to be interfered with. This may be done when the judge has gone wrong in the law, or has dealt wrongly with the facts, or has omitted to consider some material fact, but none of these things is suggested here. Hill J. decided on the facts that the omission of the *Haugland* to blow her whistle did not contribute to the collision and there was evidence to support that finding.

Bateson K.C. and *A. T. Bucknill* for the respondents (called upon only upon the question of the failure to whistle). The whistle could have been heard at a distance of two miles in ordinary fine weather.

[They also contended on the cross-appeal upon the evidence that the *Karamea* was not to blame.]

Stephens K.C. replied.

The House took time for consideration.

1921. Dec. 5. VISCOUNT FINLAY. My Lords, in this case there was a collision between the steamship *Haugland* and the steamship *Karamea* on February 12, 1919, between 10.10 and 10.25 P.M. near Monte Video. The *Karamea* was coming out from Monte Video. She had come down the narrow channel marked by a line of buoys on each hand, running N. and S. When she left the channel she made for the Whistling Buoy, which lies S. by E. from the mouth of the channel, intending to get abreast of the buoy with it on her starboard side and then to starboard so as to proceed in a south-easterly direction and out to sea. The *Haugland* was coming in towards Monte Video from the east. She passed to the south of Flores Island on a W. by N. course and about an hour afterwards she changed her course to W. ½ N. both magnetic. As she neared the Whistling Buoy

---

(1) (1915) 13 Asp. M. L. C. 203, 206.

H. L. (E.)
1921
S.S. HAUGLAND v. S.S. KARAMEA.
Viscount Finlay.

she sighted the two headlights of the *Karamea*, coming in a southerly direction, on her starboard bow, and when the red light of the *Karamea* was seen the *Haugland* ported, bringing the *Karamea* slightly on the starboard bow. The *Karamea* starboarded and the *Haugland* failed to stop and reverse, with the result that ultimately the two ships came into collision, the stem of the *Karamea* striking the port side of the *Haugland* about amidships. The above statement gives the case in broad outline, omitting all details, which are indeed in some respects obscure. The case was tried before Hill J. He found both vessels to blame, and his judgment in this respect was affirmed in the Court of Appeal. In my opinion no ground has been shown for reversing the finding of the Court of Appeal on this point. The *Karamea* was wrong in starboarding, as she ought to have kept her course, and the *Haugland*, whether she was guilty of any other fault or not, was clearly to blame for not stopping and reversing.

The point really in dispute on this appeal is as to the apportionment of the damages. Hill J. pronounced the *Karamea* liable in three-fourths and the *Haugland* liable in one-fourth of the damages. The Court of Appeal held that the case was one in which no special apportionment should be made and that the damages should be equally divided. The clause providing for apportionment in cases of damage is sub-s. 1 of the first section of the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57): "Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that—(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally. . . . ." This sub-section was considered by your Lordships' House in *The Peter Benoit*. (1) It was there laid down that only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the

(1) 13 Asp. M. L. C. 203.

part of one of the ships is no reason for apportionment unless it in part caused the damage. There can be no doubt that the fault of the *Karamea* in starboarding, when she ought to have kept her course and speed, was a substantial cause of the accident. The only question is as to the amount of blame which should be attributed to the *Haugland*. Both Courts have found the *Haugland* in default for not stopping and reversing, and it cannot be questioned that this contributed to the accident. Hill J. thought that this was the only fault on the part of the *Haugland*, and as he considered that the blame of the *Karamea* in starboarding was greater he made the *Haugland* liable only for one-fourth of the damage.

The Court of Appeal, however, found that the *Haugland* was guilty at an earlier stage of another default contributing to the damage by failing to comply with art. 28 of the Regulations for Preventing Collisions at Sea. " When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle or siren, viz. :—One short blast to mean, 'I am directing my course to starboard.' Two short blasts to mean, 'I am directing my course to port.' Three short blasts to mean, 'My engines are going full speed astern.' " There is no doubt that the *Haugland* was guilty of an infraction of r. 28. The rule is peremptory that when vessels are in sight of one another a steamship under way and taking any course authorized or required by the rules shall indicate that course by the signal specified. In the present case the two vessels were in sight of one another, and it was therefore the duty of the *Haugland* under art. 28, when she ported, to give one blast. The chief officer of the *Haugland*, when asked why he did not give the signal, gave as his reason : "Because it appeared to me that the *Karamea* was too far away ; she would not hear it." (Question 64.) This was a clear infraction of the rule. If the vessels are in sight the signal must be given. The obligation is not conditional upon the signal being audible to the other vessel.

It is easy to understand why the rule was drawn in these peremptory terms. It would be very dangerous if the officer in charge were encouraged to speculate as to whether the signal, if given, would be heard; he must give it if in sight. On this point Hill J. said: "I am not prepared to blame the *Haugland* for not whistling when she first ported. The ships were then too far apart." The *Haugland* was guilty of disobedience to the rule, but it does not follow that she is liable to contribute to the damages. If it appears that the signal, if given, could not have been heard by the other vessel, the failure to give the signal cannot have contributed to the damage, as the signal would have been useless. Hill J. must, in the passage of his judgment which I have just quoted, have meant that he found the signal could not have been heard at the distance at which the vessels were from one another, and that the failure to give it was therefore on this question of apportionment immaterial. The Master of the Rolls in the Court of Appeal said that the assessors in the Court of Appeal saw no reason in the circumstances (so far as they could judge of them without knowing exactly what the whistle was) why a helm signal should not have been heard by the *Karamea* (App., p. 195, Letter A). The Master of the Rolls referred to the fact that it was in question whether the *Haugland* should not have emphasized her position by porting more decisively as well as whether she was to blame for not giving the signal when she ported, and goes on to say (1): "Taking these two things together, I cannot myself see how the *Haugland* can be held not to blame for her manœuvres at that time. Had she at once opened her red light there certainly would have been a better chance of the *Karamea* being warned that she must not starboard. It ought not to have been necessary to warn her, because, under the rules, she had no right to starboard. Had she heard the helm signal she would have had a greater chance after being warned of correcting that manœuvre, although the distance was considerable. But as the *Haugland* omitted both to open her red light at once and to give any sound signal that she was acting for the *Karamea*, I cannot help differing from the learned judge when he says that she was not to blame for that earlier manœuvre. If she were, it seems to me that that is a fault which might very well and very likely did contribute to the collision, because it deprived the *Karamea* of the warning that she otherwise would have had which might have induced her to correct her wrong manœuvre." On this ground the Master of the Rolls and the Lords Justices were of opinion that the damages should be equally divided. It must be observed, however, that there is not now any enactment that a vessel breaking a rule shall be held to blame for the collision and therefore liable to bear some part of the damage unless the breach could not have contributed to the collision: see s. 4 of the Act of 1911. The question must be one of fact in each case whether the breach of the rule did so contribute.

---

(1) [1921] P. 82.

It is, of course, the duty of the ship to have a proper and efficient whistle. We have consulted our assessors as to the conditions affecting the audibility of the blast in the present case. In the preliminary Act the *Haugland* put the distance between the two ships when she first saw the *Karamea* as "by estimate about 3 miles," and the evidence from the *Haugland* was that the distance would then be 2½ to 3 miles. The *Karamea* put the distance when she first saw the masthead light of the *Haugland* in the Act as about 1½ to 2 miles and in evidence as 2 miles. Our assessors say that audibility of the sound in the present case must depend upon the exact distance between the vessels when the *Haugland* ported. This distance has not been found in the Courts below, and I doubt whether it would have been possible to give it exactly. There are certainly no materials before this House on which we could ascertain that distance with any accuracy. All the three members of the Court of Appeal indicate that, if it were necessary to decide the point, they would be inclined to say that the *Haugland* was to blame for not porting more decisively so as to bring red well to red at once, and Hill J. would seem to have felt some doubt upon this point. It appears to me that the *Haugland* was to blame in this respect.

It was essential that the *Karamea* should know the course the *Haugland* was taking. The officer of the *Haugland* says that owing to the distance the signal would not have been heard and that therefore he did not give it. Under these circumstances it was all the more incumbent upon him to make sure that the *Karamea* was informed, by porting decisively. There was nothing to prevent him from doing this, and if the *Haugland*, instead of steadying while the *Karamea* was still on his starboard bow, had brought his vessel round so that she was well port-side to port-side with the other, his red light would have given the information which he says could not be conveyed by signal. In the absence of a finding that the signal, if given, would have been heard I should have difficulty in agreeing with the Court of Appeal that the mere failure to give the signal would have made the *Haugland* contributory to the damage.

I think also that a finding that the signal, if given, would have been heard would be justifiable upon the evidence.

The *Haugland* broke the rule by not giving the signal. It is certainly possible that the signal, if it had been given, would have been heard. All that we have to the contrary is the statement of the officer who wrongfully failed to give the signal that he thought the *Karamea* was too far away to hear. It would be extremely dangerous if any encouragement were given to neglect the duty of giving the signal by accepting without some definite evidence the plea of the officer in default that the signal would not have been heard. I think we ought to presume in the present case as against the *Haugland* that if she had done her duty by giving the signal in the present case it would have been heard. She was in the position of a wrongdoer, and no satisfactory grounds are shown for coming to the conclusion that giving the signal would have made no difference in the result.

For these reasons I think that the appeal and cross-appeal should both be dismissed.

My Lords, I am authorized to say that my noble and learned friend Lord Shaw concurs in the judgment.

VISCOUNT CAVE. My Lords, I have come to the same conclusion, and for the following reasons. When the two vessels came in sight of one another the *Karamea* was outward bound from Monte Video and was heading south, and the *Haugland* was heading west and had the *Karamea* on her starboard bow. They were, therefore, crossing vessels; and under arts. 19 and 21 of the Collision Regulations it was the duty of the *Haugland* to keep out of the way and of the *Karamea* to keep her course and speed. The *Karamea* did not keep her course, but when abreast of the Whistling Buoy she starboarded and so brought about a position of danger. For this, both Courts have held her to blame, and with that finding I agree.

Turning now to the conduct of the *Haugland*, it appears that on seeing the *Karamea* she ported but failed to give a short blast as required by the rules; that she afterwards starboarded slightly; and that when on approaching the buoy she saw the *Karamea* bearing down on her, she put her helm hard aport and went full ahead until the collision occurred. I do not think that she showed her red light to the *Karamea* except for a short time after her first porting and for a few seconds immediately before the collision. The *Haugland* has been held by both Courts to be to blame for going full ahead when a collision was imminent instead of reversing her engines; and I think it clear that this was a wrong manœuvre, and that to this extent she was responsible for the disaster. But is the *Haugland* also to be held responsible for not blowing her whistle when she first ported her helm? As to this, her master says that he ported partly to get closer to the buoy and partly for the *Karamea*. He was therefore in sight of the *Karamea* and acted for her; and it follows that he was within art. 28 and by not blowing infringed that rule. It is said that the neglect to blow did not contribute to the collision, or (in other words) that there was no causal connection between the neglect and the damage. But this contention rests wholly on the statement of the chief officer of the *Haugland* that it "appeared to him" when he ported that the *Karamea* was too far away to hear the whistle; and I think it would be dangerous to accept such a statement by the officer in default as a sufficient ground for absolving the ship from responsibility. The vessels are said to have been from one and a half to two miles apart, and a light wind was blowing from the *Haugland* in the direction of the *Karamea*. The assessors advising the Court of Appeal saw no reason why at that distance the whistle (if an efficient one) should not have been heard; and the experts advising your Lordships on this appeal did not differ from that view. In the circumstances, it cannot be said to be proved that the whistle would not have been heard; and in the absence of such proof I think the presumption is against the ship which broke the rule. Upon this point I agree with the Court of Appeal and consider that the *Haugland* was responsible on this ground also.

My conclusions on the above points render it unnecessary for me to consider whether the *Haugland* is also to be held responsible for not porting more "handsomely" than she did so as to show her red light more clearly to the *Karamea*. My impression is that she ported sufficiently at the time —her chief officer's evidence is to the effect that she went round 3½ points—and that her mistake was in afterwards starboarding so as to obscure her red light; but the evidence on this point is confused, and it is not necessary to deal with it in detail. Having regard to all the circumstances of the case, I think that it is impossible to establish different degrees of fault, and accordingly that the liability should be apportioned equally.

I agree that the appeal and cross-appeal fail and should be dismissed with costs, such costs to be set off.

LORD DUNEDIN. My Lords, I concur.

LORD PHILLIMORE. My Lords, I have had the advantage of reading the opinions of the noble Lords already pronounced, and I desire to express my concurrence with them, and also with the judgments in the Court of Appeal.

There are considerable difficulties in the story of the *Haugland*; but upon the *Karamea's* own showing the vessels were at one time so heading that they might be considered as vessels crossing so as to involve risk of collision, and this being the case it was the duty of the *Karamea* to keep her course and not to starboard, as she did, and certainly her starboarding contributed to the collision. Therefore, she was rightly held to blame. With regard to the *Haugland*, both Courts found her to blame for not stopping and reversing her engines before the collision, and your Lordships have had no doubt that this is right, and that she must be held partly in fault. I think that she was further in fault for not blowing the whistle signal required by the rules to be given by one vessel taking action for another. The *Haugland* was the ship that had to give way, and her proper course was to do so by porting her helm, and signifying the same by a short blast on her whistle. She did not blow a blast when she ported her helm, nor till just before the collision. The excuse given by her officer for not doing so is that the vessels were too far apart for the whistle signal to be heard. It is a lame excuse at the best, and in my view it has no firm foundation. If, as suggested, the vessels were two miles apart when the order to port was given, it might be that the signal would not have been heard, but as I read the evidence it is impossible that any effective order to port for the *Karamea* could have been given at two miles; if it had been given then, there would have been no collision. I believe that the order to port for the *Karamea* was given much later. There might have been an order to port for the buoy to bring it ahead (I do not say there was) when the vessels were two miles apart, but, if so, it was not given for the *Karamea*. It might be the true explanation for not blowing the whistle, if, in fact, the action was not taken for the *Karamea*, but in the ordinary navigation of the *Haugland* to enable her to run into Monte Video. I believe that when the helm was ported for the *Karamea* the vessels were within hearing distance.

Then I further agree with the Court of Appeal that the porting of the *Haugland* for the *Karamea*, whenever this action was taken, was not sufficiently large and effective. It might be thought as a matter of law that all that the ship which has to get out of the way has to do is to take just sufficiently effective steps in just sufficient time, and it might be thought that she so doing ought not to be found to blame, even if the insufficiency and delay of the proper manœuvre has puzzled the other ship and led her to do something which she should not. I pronounce no opinion. But it is in order to prevent this state of things arising that the provisions for these whistle signals have been introduced into the regulations. When I was first acquainted with these matters, these provisions were not in the rules. It was only experience, when steamship collisions became frequent, that showed the necessity for them. Supposing that the *Haugland* had ported just enough to have avoided the collision if the *Karamea* had not starboarded. It was the very smallness and lateness of this porting, coupled with the absence of the affirming signal, which led the *Karamea* to starboard. The two matters cannot be separated. The signal might not have been wanted if the porting had been in itself sufficiently significant, but the porting being insignificant, the signal was required. And the disobedience of the rule in failing to give it was an important contributory cause of the collision.

Order of the Court of Appeal affirmed and original and cross appeals dismissed with costs; the costs to be set off.

Lords' Journals, Dec. 5, 1921.

Solicitors for the appellants: *Thomas Cooper & Co.*
Solicitors for the respondents: *Ince, Colt, Ince & Roscoe.*

[PRIVY COUNCIL.]

J. C.*
1921
Oct. 20.

G. M. O'MEARA AND ANOTHER . . . . APPELLANTS;

AND

BENNETT AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Gift—Shares in Company—Delivery of Movable Property—Declaration of Trust—"Convey"—Civil Code of Lower Canada, arts. 776, 981 (*a*).

The provision in art. 776 of the Civil Code of Lower Canada that gifts of movable property accompanied by delivery may be made and accepted by private writings and verbal agreements, relates only to such movable property as is capable of passing by delivery. In art. 981 (*a*) of the Code, which provides that a person may "convey" property to trustees by gift for another, the word "convey" does not cover a transaction of the kind known in English law as a declaration of trust.

There is, therefore, under the law of Quebec, no valid gift of shares where the registered holder, intending to make a gift of them, signs a transfer indorsed on the certificate purporting for value received to transfer the shares to herself as trustee for the intended donee; and the company issues to the intending donor a new certificate (afterwards handed to the intended donee) certifying that the registered holder is the intending donor in trust for the intended donee.

Judgment of the Court of King's Bench affirmed.

APPEAL from a judgment (December 16, 1918) of the Court of King's Bench for the Province of Quebec, affirming a judgment (May 11, 1918) of the Superior Court of that Province.

The first appellant claimed that 130 preferred shares and thirty-three ordinary shares in a company incorporated under the Canadian Companies Act belonged to her by virtue of a gift inter vivos from the holder since deceased; the first respondent was entitled to the shares under the will of the deceased holder if the alleged gift was not established.

The facts upon which the alleged gift was based appear from the judgment of the Judicial Committee.

---

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD CARSON and SIR LOUIS DAVIES.

The trial judge (Lamothe J.) held that there was no valid gift inter vivos according to the law of Quebec; that decision was affirmed on appeal to the Court of King's Bench, appeal side, by a majority (Carroll, Pelletier, and Tellier JJ.; Cross and Martin JJ. dissenting). The appeal is reported at Q. R. 28 K. B. 332.

1921. July 14, 16. *Geoffrey Lawrence* for the appellants. There was a valid gift inter vivos of the shares in accordance with art. 776 of the Civil Code, with a retention of a usufruct. The delivery and possession of the shares complied with art. 808. The term "movable property," in art. 776, or in the French version "choses mobilières," includes incorporeal things. Further, there was a gift inter vivos by declaration of trust, valid as a gift under art. 981 (*a*). There is no substantial difference in this respect between the law of Quebec and that of England. The word "convey" in that article includes a declaration of trust; "transporter" in the French version is not used in a technical sense. The only legal form of transfer in the case of shares was adopted. Having regard to the terms of the certificate issued, Mrs. Thomas cannot be regarded as the owner. Under the law of Quebec the legal property is not in a trustee: Mignault, Droit Civil, vol. v., pp. 155 et seq.; it is therefore in the beneficiary. There being no law of trusts in French law, the chapter of the Civil Code which introduced trusts into the law of Quebec must be taken to have introduced the English law except so far as it is expressly excluded. [Reference was also made to arts. 383, 387, 754, 777, 787, 788, 791, 808; and to *Ex parte Pye.* (1)]

Lanctot K.C., *Holt K.C.*, and *M. Alexander* for the respondents were not called upon.

Oct. 20. The judgment of their Lordships was delivered by

Lord Buckmaster. The question in this appeal relates to the ownership of 130 preferred shares and thirty-three ordinary shares of the capital stock of the Corby Distillery

---

(1) (1811) 18 Ves. 140, 149, 150.

Co., Ld., who are the second respondents. The shares are claimed by the appellant Mrs. O'Meara (hereinafter called the appellant), by virtue of a gift alleged to have been made in her favour by Mrs. Mary M. Thomas, who was the rightful holder of the shares; this claim is disputed by the first respondent, Mrs. Constance Edith Bennett, who claims as a beneficiary under the will of Mrs. Thomas, the remaining respondents, the Royal Trust Co., being the executors of the will.

The shares in question were originally held by Mrs. Thomas in her own right, and at the end of 1912 she formed the intention of disposing of them in favour of the appellant, who states—and her statement is not contradicted—that this intention was mentioned to her by her mother at an interview which took place some time before January, 1913. To use the appellant's own language, what took place was this: "The terms she used—as well as I can remember them—were that she had decided to give these shares to me as a gift and that she did not want them to form any part of her estate at death, or to be affected by her will, but that she intended to reserve to herself the dividends on the shares during her own lifetime. She mentioned at the time that she had once intended this investment for her son Arthur, my brother, but as he was dead, she decided to give these shares to me. My mother also said either that she had, or that she would have, my father attend to having these shares transferred into my name. I accepted the gift from my mother and both my husband and I thanked her for it."

In order to carry out this intention, Mrs. Thomas communicated through her husband with the company, informing them of her desire that the shares should be regarded as held by her in trust for the appellant, but that the dividends should be forwarded to her as usual, and in accordance with their directions the certificates were sent to the company with an indorsed transfer on the back in these words: "For value received I hereby sell, assign and transfer unto Mary M. Thomas in trust for Gertrude Mary O'Meara
shares of the capital stock represented by the within

certificate, and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within-named Company with full powers of substitution in the premises"; and this was duly signed by Mrs. Thomas and also by her husband. The original certificates were cancelled and in their place two new certificates were issued, dated January 15, 1913. The one as to the ordinary shares was in this form: "This certifies that Mrs. Mary M. Thomas, in trust for Mrs. Gertrude M. O'Meara, is the registered holder of 33 common shares"; and the one for the preference shares was in similar terms. These certificates again contained transfers in blank upon their back, but neither of these transfers was ever executed. The certificates were handed to Mrs. O'Meara some time afterwards and have remained in her custody ever since, but the dividends were received by Mrs. Thomas during her life. The question is whether in these circumstances a valid gift of the shares was made in favour of the appellant.

This question falls to be determined exclusively by the consideration of the Quebec law, and this is contained in the Code, the construction of which is the real question in the action. By arts. 383 and 387 the shares in question are, by determination of law, regarded as movable property. By art. 754 it is provided that a person cannot dispose of his property by gratuitous title otherwise than by a gift inter vivos or by will. Art. 755 defines a gift inter vivos as an act by which the donor divests himself by gratuitous title of the ownership of a thing in favour of the donee, whose acceptance is requisite and renders the contract perfect. In this case there seems no doubt that acceptance was given. Art. 758 declares that a gift made so as to take effect only after death, which is not valid as a will, or as permitted in a contract of marriage, is void; and art. 760 enables a gift to be conditional. The Code then proceeds to contemplate the different forms by which gifts may be made, and they may either be by deed, or, in the case of movable property accompanied by delivery, may be made by private writing. This is regulated by art. 776 which provides that "gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements." There was no deed in the present case as between the donor and the donee. Apart, therefore, from the question as to the effect of the trust, the gift in this case can only be established if it were made by delivery. Now the share certificates were not negotiable documents. Whatever might have been their commercial quality, if the transfer had been executed, in the form in which they stood, they were not capable of passing the property by delivery, nor of effecting any change in ownership. "Gifts of moveable property accompanied by delivery" in art. 776 must, in their Lordships' opinion, be read as relating solely to gifts of such movable property as is capable of passing by delivery, for delivery has no value, apart from being evidence, unless it can effect a change of ownership, and it is not to evidence that the provisions of the section as to delivery relates, for this is provided by "the private writings or verbal agreements." This explanation of the meaning of art. 776 becomes plain, when the French version of the Code is examined, for the words used to describe the class of property are "choses mobilières," and this phrase is distinct from the word "biens," the interpretation of which includes shares in a company. This distinction has been pointed out by Pelletier J., to whose close analysis of the argument their Lordships have nothing further to add. It is true that this view appears to differ from that of Cross J., who considers that a "gift of shares in a trading company's stock can be made verbally." But this fails to give any effect to the difference between share certificates that are negotiable and those that are not, for if the gift in the present case were effected by the delivery and the verbal statement, the alteration in the books of the company would not add to the essentials of the gift, and the form of the certificates would be equally immaterial unless indeed they were in the name of the donee, with the result that no difference would exist between the delivery of a negotiable and a non-negotiable instrument. In fact, in this case, there was no transfer of ownership.

What was attempted was to impose upon the ownership of Mrs. Thomas a trust which would operate in favour of the appellant, and, but for the law permitting the creation of trusts, the alteration upon the certificates and in the books of the company would not have effected any change at all. The extent to which trusts can now be created varies the position. It is true that if the shares had been shares in a bank the liability might have been cast in a case of insolvency upon the appellant by virtue of s. 53 of the Banks Act, but the same thing is not true of the Companies Act, which merely provides that the estate and funds shall be liable ; no liability is cast upon the beneficiary. If the gift by delivery of the shares were in itself good, the change of name in the register of the books of the company would not have added to its effect ; it would only have afforded evidence of the gift ; and if, as their Lordships think, the delivery of the certificates, though accompanied by words of gift, did not alone create a gift inter vivos, there remains only the consideration of the effect of the attempted verbal creation of the trust.

In considering this it is essential to remember that the law of trusts is not innate in the law of Quebec, and that an examination of the question of how far the transaction would have been valid under English law is misleading until it is ascertained to what extent the English law applies. The article in the Code that is applicable is 981 (*a*), which provides that persons capable of disposing of their property may convey property, movable or immovable, to trustees by gift or by will for the benefit of the persons in whose favour they can validly make gifts or legacies. It is urged here that the word " convey " (a translation of the French word " transporter ") covers a transaction well known to English law effected by means of a declaration of trust. But their Lordships find it impossible to impose such a meaning on the word. A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it, and, in their Lordships' opinion, art. 981 (*a*) does not include such a transaction.

They are strongly confirmed in this view by the comment that is to be found in the well-known book by Mr. Mignault on the Canadian Code. At p. 157 of vol. v. there is a discussion upon the creation of a trust by a gift, and in this connection he considers how far the acceptance of the beneficiary is necessary to complete the transaction; as trusts had their origin in the English law he considers this matter in connection with those principles and continues in these words: "Or, il est certain que, dans le droit anglais, l'acceptation du bénéficiaire n'est nullement nécessaire pour lier le donateur. Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, sans l'intervention de personne, et le bénéficiaire peut acquérir en vertu d'une disposition dont il n'aurait pas eu connaissance." The phrase: "Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, sans l'intervention de personne," appears to their Lordships to show the contrast which the learned author himself felt between the English and the Quebec principles of law, for if it had been possible according to the Quebec Code for a person holding property to create himself a trustee, there would have been no need for his emphasis on this peculiarity of the English law for the purpose of proving that acceptance was unnecessary. There can be no conveyance by a person to himself, and as the declaration of trust is a method of creating a fiduciary relationship which, in their Lordships' opinion, is unknown to the law of Quebec, the appellant's argument upon this point must also fail.

There is only one further point which needs to be mentioned. That is to be found in the judgment of Cross J., who says that the appellant's title can be justified on the further ground that, even though the conveyance to her was in reality a gift, it was nevertheless put into the form of a transfer for value received. But there never was in fact any conveyance to her. The statement of the value received occurs in the transfer which was found upon the share certificates as they were originally held by Mrs. Thomas, and is in fact nothing but a transfer to herself in trust for her daughter. This was in accordance with the direction

J. C.
1921
O'MEARA
v.
BENNETT.

of the company, who requested that it should be done in order that they might make the necessary entries and issue the new certificates, and who may have been under a misapprehension as to the legal effect of this change. There has been no gift by delivery, for the property was incapable of being so transferred. There has been no transfer by deed, for no deed was executed in favour of the appellant; and the attempted creation of the trust fails for the reasons which their Lordships have pointed out.

They, therefore, think that the judgment of the Court of King's Bench for Quebec was correct, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1921
Oct. 27.

ROYAL TRUST COMPANY . . . . . APPELLANTS;

AND

MINISTER OF FINANCE OF THE PROVINCE OF BRITISH COLUMBIA } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Succession Duty—Property within and outside Province—" Net value "—Succession Duty Act (R. S. B. C. 1911, *c.* 217), *ss.* 2, 7.

The effect of the definition of "net value" in s. 2 of the Succession Duty Act of British Columbia (R. S. B. C., 1911, c. 217) is not that that expression wherever used in the Act means the value of all the property of the deceased wherever situate, less his debts and incumbrances, but that it means the particular property with reference to which the expression is used in the section to be construed, less the deductions mentioned.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD PARMOOR, LORD CARSON, and SIR ROBERT STOUT.

J. C.
1921
ROYAL TRUST COMPANY
v.
MINISTER OF FINANCE.

Where, therefore, a person domiciled in the Province dies leaving property situate within and property situate outside the Province, the succession duty payable under s. 7 of the Act is to be computed with reference only to the property within the Province.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment (June 21, 1920) of the Supreme Court of Canada, reversing a judgment (July 15, 1919) of the Court of Appeal of British Columbia, which affirmed a judgment of Hunter C.J. of the Supreme Court of that Province.

The appeal related to succession duty payable under s. 7 of the Succession Duty Act of British Columbia (R. S. B. C., 1911, c. 217) and involved the construction of that section.

The terms of the section, the facts giving rise to the appeal, and the division of judicial opinion in Canada upon the question of construction appear from the judgment of the Judicial Committee.

The Supreme Court of Canada held by a majority that where a person domiciled in British Columbia dies possessed of property within and outside the Province, the whole of his property is to be taken into account in computing the succession duty payable under the section. The decision of the Supreme Court of Canada is reported at 61 Can. S. C. R. 127; those of the Courts in British Columbia at 27 Brit. Col. Rep. 267.

1921. July 27. *Sir John Simon K.C.* and *Geoffrey Lawrence* for the appellants.

Owen Thompson K.C. and *A. M. Latter* for the respondent.

The respective contentions as to the effect of s. 7 of the Act appear from the judgment. The appellants submitted further that if that section was to be construed as the respondent contended, the section was ultra vires under the British North America Act, 1867, ss. 91, 92; the respondent was not called upon as to that submission.

Oct. 27. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This appeal raises a question as to the construction of the Succession Duty Act of British Columbia.

J. C.
1921
ROYAL TRUST COMPANY
v.
MINISTER OF FINANCE.

By s. 5 of the Succession Duty Act of 1907 (being c. 217 of the Revised Statutes of 1911) all property of a deceased person, whether domiciled in the Province or not, which is situated within the Province, is made subject on his death to succession duty, the rate of duty being fixed by ss. 7 to 9 of the Act.

Sect. 7 of the Act, as amended by the Succession Duty Act of 1915, is as follows: "7. When the net value of the property of the deceased exceeds 25,000 dollars and passes under a will, intestacy or otherwise either in whole or in part to or for the use of the father, mother, husband, wife, child, daughter-in-law or son-in-law of the deceased, all property situate within the Province or so much thereof as so passes (as the case may be) shall be subject to duty as follows: (*a*) Where the net value exceeds 25,000 dollars but does not exceed 100,000 dollars, at the rate of one dollar and fifty cents for every 100 dollars. (*b*) Where the net value exceeds 100,000 dollars but does not exceed 200,000 dollars, at the rate of one dollar and fifty cents for every 100 dollars of the first 100,000 dollars and two dollars and fifty cents for every 100 dollars above the 100,000 dollars. (*c*) Where the net value exceeds 200,000 dollars, at the rate of one dollar and fifty cents for every 100 dollars of the first 100,000 dollars, two dollars and fifty cents for every 100 dollars of the second 100,000 dollars and five dollars for every 100 dollars above the 200,000 dollars."

Sect. 8 of the Act fixes the duty on property situate within the Province, and passing on death to a lineal ancestor of the deceased (other than a father or mother) or to a brother or sister of the deceased or a descendant of a brother or sister or to an uncle or aunt of the deceased, or a descendant of an uncle or aunt at 5 per cent. of the net value; and s. 9 fixes the duty on all property situate within the Province and passing to a more distant relation or to a stranger in blood at 10 per cent. of the net value.

"Net value" is defined in the interpretation clause (s. 2) of the Act as meaning "the value of the property, both within and without the Province, after the debts, incumbrances, or

J. C.
1921
ROYAL TRUST COMPANY
v.
MINISTER OF FINANCE.

other allowances or exemptions authorised by this Act, are deducted therefrom."

The late Sir William Cornelius Van Horne died at Montreal on September 11, 1915, being then domiciled in the Province of Quebec, and having made a will whereby (subject to a legacy of 200,000 dollars in favour of a grandson) he left his property to his wife, son and daughter in unequal shares. The gross value of his estate within and without British Columbia was found to be 6,371,374.73 dollars and his gross liabilities 169,989.56 dollars, leaving a net value of 6,201,385.17 dollars. His only property in British Columbia consisted of certain shares which were valued at 300,000 dollars; and if a proportion of the gross liabilities (namely, 9,536.75 dollars) is deducted from the last-mentioned sum, it appears that the net value of the property in British Columbia was 290,463.25 dollars. No question is raised in these proceedings as to what is to be described as property within the Province, or as to the propriety of deducting the above-mentioned sum of 9,536.75 dollars; and the above sum of 290,463.25 dollars is practically an agreed figure. It is with reference to the amount of succession duty payable on this sum of 290,463.25 dollars that the contest in this case has arisen.

The amount of duty claimed by the respondent, the Minister of Finance of British Columbia, was 14,242.10 dollars, made up as follows:—

1½ per cent. on	$\frac{290{,}463\cdot25}{6{,}201{,}385\cdot07}$	of $100,000, or $4,683·84 ..	$70·24
2½ per cent. on	$\frac{290{,}463\cdot25}{6{,}201{,}385\cdot07}$	of $100,000, or $4,683·84 ..	117·09
5 per cent. on	$\frac{290{,}463\cdot25}{6{,}201{,}385\cdot07}$	of $6,001,385·07 or $281,095·57	14,054·77
			$14,242·10

The appellants, the executors of Sir William Van Horne, denied that they were liable under the statute for the above sum of 14,242.10 dollars, but admitted liability for 8,523.16 dollars, made up as follows :—

1½ per cent. on $100,000	$1,500·00
2½ per cent. on $100,000	2,500·00
5 per cent. on $90,463·25	4,523·16
	$8,523·16

The appellants accordingly presented a petition to the Supreme Court of British Columbia praying that it might be declared that the claim of the respondent proceeded upon a wrong basis, and that the succession duty payable was 8,523.16 dollars, and no more.

The petition has given rise to a remarkable division of judicial opinion. The Chief Justice of British Columbia (Hunter C.J.), by whom the petition was heard, gave judgment in favour of the appellants. On an appeal by the respondent to the Court of Appeal of the Province that Court by a majority of three to two (Macdonald C.J.A., Galliher J.A. and Eberts ; Martin and McPhillips JJ.A. dissenting) affirmed the judgment of the lower Court and dismissed the appeal ; but on a further appeal to the Supreme Court of Canada, that Court by a majority of three to two (Idington, Duff and Brodeur JJ. ; Anglin and Mignault JJ. dissenting), reversed the decision of the Court of Appeal of British Columbia, and decided in favour of the Minister of Finance. Thereupon the present appeal was brought by the executors to His Majesty in Council.

The claim of the respondent, the Minister of Finance, which has been affirmed by the Supreme Court, rests upon the following basis. He contends that, having regard to the definition of "net value" contained in s. 2 of the Act, the expression, "net value" in paras. (*a*), (*b*) and (*c*) of s. 7, means the total net value of the testator's estate wherever situate, and accordingly that the sums of "100,000 dollars" and "200,000 dollars" mentioned in those paragraphs are to be treated as constituent parts of that total net value. Thus, taking para. (*c*) as the paragraph applicable to the present case, it is said that the meaning and effect of that paragraph is that where (as in this case) the total net value of the testator's estate, wherever situate, exceeds 200,000 dollars, the duty is to be calculated at the rate of 1½ per cent. on the first 100,000 dollars of that total net value, 2½ per cent. on the second 100,000 dollars of that total net value, and 5 per cent. on the remainder of the same total net value; but that, as it cannot be intended that the property within the Province shall be charged with a percentage on the net value of the whole estate wherever situate, the duty when so calculated is to be levied only on such proportion of each constituent part of the total net value as is situate within the Province. The argument is most clearly stated in the following extract from the judgment of Duff J.: "Net value as defined in the interpretation section means a net value ascertained by taking into account the value of all property both within and without the Province. It seems reasonably clear that the scheme contemplated by the Legislature as brought into force by para. (*c*), is that for the purpose of ascertaining the rate in the case of estates falling within that paragraph, the net value of the estate is to be divided into three parts, the first being the sum of $100,000, the second also being the sum of $100,000, the third being the difference between the sum of $200,000 and the sum representing the aggregate net value; the net value in every case as already mentioned being ascertained by reference to the whole of the property both within and without the Province. This division having been made, the rate prescribed by para. (*c*) is the rate of one dollar and fifty cents notionally applied to the whole of the first $100,000 of the net value; the sum of two dollars and fifty cents for every $100 on the second $100,000 notionally applied to the whole of that sum, and five dollars for every $100 above the $200,000 notionally applied to the whole estate both within and without the Province. In this manner the rate of taxation is ascertained. The property taxed, however, is only the property situated within the Province, and in the case of each of the parts only that part of the first $100,000, the second $100,000 or the excess over $200,000, as the case may be, which is so situate is subject to taxation according to the several rates prescribed by sub-s. (*c*), for the parts mentioned."

It is obvious that the effect of so calculating the duty is to accelerate, in the case of a deceased person who leaves property both within and without the Province, the process of graduation on the property within the Province; and, if this be the clear meaning of the statute, there appears to be no reason why it should not have effect. As Martin J. says, "it is not a matter of indirect taxation at all, but simply the fixing of a basis of domestic assessment in certain varying circumstances, domestic and foreign." But taxation, to be effective, must be imposed by clear words; and, with great respect to the learned judges who have taken a different view, their Lordships are unable to find in the Act any words imposing the tax which the respondent claims to levy. If the expression "net value" in para. (*c*) means the total net value of the property of the deceased, then the duty imposed by the paragraph is, according to the natural meaning of the language used, a percentage upon that total net value; and, if this construction leads to results which are inadmissible, those results cannot be avoided by importing into the paragraph a principle of proportionate levy which is not to be found there. In order to support the respondent's construction it would be necessary to substitute for "the first 100,000 dollars" in para. (*c*) some such words as the following: "a sum bearing the same proportion to the first $100,000 as the net value of the property situate within the Province and passing to any of the persons described in this section bears to the net value of all the property of the deceased," and to make corresponding changes in the later words of the paragraph. This would be, not to construe, but to amend the Act; and it appears to their Lordships that it would be contrary to the established rule as to the construction of taxing statutes to make so generous an addition to the language of the Act.

On the other hand, their Lordships have difficulty in accepting the argument put forward by counsel for the appellants. They contended that, even if the "net value" referred to at the beginning of para. (*c*) is the net value of the whole estate of the deceased, wherever situate, the sums of 100,000 dollars and 200,000 dollars mentioned in the latter part of the same paragraph are nevertheless intended to be constituent parts of the net value within the Province only; but such a construction would not be consistent with the language of the paragraph. The "first 100,000 dollars" and the "second 100,000 dollars" mentioned in the paragraph are plainly intended to be fractions of the net value mentioned in the first words of the paragraph; and the expression "the 200,000 dollars" occurring at the end of the paragraph can only refer to the 200,000 dollars of net value specified at the beginning. Further, if the meaning of the paragraph is that the duty is to be graduated according to the net value of the property within the Province only, there is no sense or purpose in making that graduation contingent on the total net value of the estate reaching a particular figure.

In these circumstances it is necessary to seek some other solution of the problem; and in the opinion of their Lordships the solution is to be found in a close consideration of the meaning of the expression "net value" as used in s. 7 of the Act. Sect. 2 does not say (as was assumed in the argument) that "net value" wherever used means the value of all the property of the deceased wherever situate, less his debts and incumbrances, but only that "net value" means the value of "the property"—that is to say, of the particular property with reference to which the expression is used in the section which is to be construed—whether that property be within or without the Province, less the authorized deductions from that value. If so, then, the expression "net value" used in paras. (*a*), (*b*) and (*c*) of s. 7 is properly and naturally to be referred to the property described in the words immediately preceding those paragraphs, that is to say, to the property within the Province passing to the near relatives mentioned in the section, and the sums of "100,000 dollars" and "200,000 dollars," afterwards referred to, are

J. C.
1921
ROYAL TRUST COMPANY
v.
MINISTER OF FINANCE.

to be treated as constituent parts of that net value; and it follows that the rate of taxation is to be ascertained with reference to the net value of the property within the Province only. It may be objected that the initial words of the section ("where the net value of the property of the deceased exceeds 25,000 dollars") refer to the total net value of the estate, and no doubt this is so. But those words are introduced only for the purpose of keeping the section in compliance with s. 4 of the Act, which provides that where the net value of the property of the deceased does not exceed 25,000 dollars, no succession duty shall be payable on property passing to a parent, husband, wife, child, daughter-in-law or son-in-law of the deceased; and there is no reason why they should govern the meaning of "net value" throughout s. 7.

The construction here suggested, which also commended itself to Macdonald C.J.A., is more consistent with the history of s. 7 than that for which the respondent contends. In that section, as passed in 1907, paras. (*b*) and (*c*) were similar in form to para. (*a*), and read as follows: "(*b*) Where the net value exceeds 100,000 dollars, but does not exceed 200,000 at the rate of two dollars and fifty cents, for every 100 dollars. (*c*) Where the net value exceeds 200,000 dollars, at the rate of five dollars for every 100 dollars." It is difficult to construe these paragraphs otherwise than as imposing a tax of 2½ per cent. or 5 per cent. (as the case may be) on the property to be taxed; and it is most improbable that the amendment made in 1915, which was obviously enacted for the relief of the taxpayer, can have been intended to alter the whole construction of the section to his detriment.

Further, the above construction of s. 2 of the Act makes it possible to put a reasonable interpretation on ss. 8 and 9. Sect. 8 provides that where the net value of the property of the deceased exceeds 5000 dollars (the minimum sum mentioned in s. 4) and passes in whole or in part to a lineal ancestor of the deceased (except his father or mother) or to his brother, sister, uncle or aunt or their descendants "all property situate within the Province or so much thereof as so passes (as the case may be) shall be subject to a duty of

J. C.
1921

ROYAL TRUST COMPANY *v.* MINISTER OF FINANCE.

five dollars for every 100 dollars of the net value without any exemption." If (as the respondent contends) the "net value" here referred to is the total net value of the estate, then it is necessary here also to calculate the duty on the whole estate wherever situate and then to apply the principle of proportionate levy in order to support the taxation; but if "net value" means the net value of the property within the Province passing to the persons named in the section, then there is a direct levy of 5 per cent. on the value of that property. The pecuniary result of both methods may be the same; but the first method is artificial and indirect, while the latter is simple and direct. The same observations apply to s. 9.

For the above reasons their Lordships are of opinion that the claim to duty made by the Minister proceeds upon an erroneous basis, and that the amount of duty payable by the appellants is the sum of 8,523.16 dollars and no more; and they will humbly advise His Majesty that this appeal should be allowed, and the order of the Chief Justice of British Columbia restored. The respondent will pay the appellants' costs of the appeal to the Supreme Court of Canada, and their costs of this appeal.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondent: *Gard, Lyell, Betenson & Davidson.*

[PRIVY COUNCIL.]

THE RANNVEIG.

J. C.*
1921
Nov. 8.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Contraband Goods—Neutral Ship—Construction of International Agreement—Enemy Base of Supply—Condemnation of Ship—Carriage of Contraband—Belief that Trade authorized.

Judgment of the President (reported at [1920] P. 177) affirmed, whereby he held that an agreement made between the United States of America and Norway on April 30, 1918, and assented to by Great Britain, did not, upon its true construction, amount to a licence to Norway to export the quantity of fish and fish products therein referred to free from the belligerent right of capture.

An enemy port found to have been a base of supplies during actual hostilities, was held to have continued to be so during the armistice in the absence of evidence to the contrary.

A neutral ship carrying a complete cargo of conditional contraband to an enemy base of supply condemned, although the shipowners had bona fide, but erroneously, believed that the agreement above referred to amounted to an unqualified sanction by Great Britain of the export of the goods.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) delivered on March 16, 1920. (1).

The appeal was by the owners of the Norwegian steamship *Rannveig* and by the German owners of her cargo of salted herrings, from the condemnation of ship and cargo by the President (Sir Henry Duke).

The facts of the case appear from the judgment of the Judicial Committee and from the report (1) of the proceedings in the Prize Court.

1921. Oct. 24, 25. *Inskip K.C.* and *Balloch* for the appellant shipowners.

Leck K.C. and *Roland Burrows* for the appellant cargo owners.

---

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1920] P. 177.

Sir Ernest Pollock S.-G. and *Pearce Higgins* for the respondent, the Procurator-General.

[Reference was made to the cases mentioned in the judgment of the President, also to *Usparicha* v. *Noble.* (1)]

Nov. 8. The judgment of their Lordships was delivered by

LORD SUMNER. This is an appeal by Norwegian shipowners, the Aktieselskabet Osterjolingen, and by German cargo owners, the Reichsfischversorgung, against a decree whereby a cargo of salted herrings in transit from Christiansand to Stettin and the steamship *Rannveig*, on which it was laden, were condemned, the first as being conditional contraband bound to a German base of supply, and the second as having carried it with full knowledge of its character and destination. Both appellants relied chiefly on an international agreement, called the Norwegian-American Agreement, dated April 30, 1918. The German cargo owners appeared and claimed the benefit of this agreement, and were heard without objection to argue that it was binding on the Crown, which is not contested, and that it assured to the traffic in question immunity from capture and condemnation. This is the main question in the appeal. The shipowners claimed that under this agreement, read in combination with another called the Tonnage Agreement, made between His Majesty's Government and the Norwegian Shipowners' Association in the previous November, they were entitled to carry this cargo to Stettin without interference, or at least were reasonably warranted in so reading the agreements and therefore should not suffer condemnation of the ship.

There is a passage in the President's judgment which their Lordships will mention before passing on. He observes, and apparently as a step in his train of reasoning: "To license such a transaction on the part of an alien friend would be to license an unneutral act whereby he must of necessity lose his character of friend. There is nothing in the terms of the agreement which shows an intention to authorise Norwegian traders to do any act inconsistent with neutrality.

---

(1) (1811) 13 East, 332.

J. C.
1921
THE RANNVEIG.

The Norwegian trade with Germany in fish which is provided for is, in my opinion, that trade only which is consistent with neutrality, and not trade which is contraband." (1)

This passage, doubtless by inadvertence, appears to assume that the carriage of the cargo in question would, apart from the Norwegian-American Agreement, have been an unneutral act in the carrier, and that to have permitted it to be shipped, would have been a breach of neutrality on the part of the Norwegian Government. It is not, however, the crucial point of his decision. The carriage of contraband, though hazardous, is not an unlawful or an unneutral trade. The fact that it is subject to the right of the belligerent to prevent it by capture on the high seas makes it necessary to consider whether the appellants in this case are relieved from the consequences of such capture by the operation of the agreements in question.

The Norwegian-American Agreement had on its face many objects, and in construing it they may well be borne in mind. Furthermore, it is material to remember that it was entered into by the Norwegian Government on the one hand through its special representative, and on the other by the chairman of the War Trade Board of the United States, an organization empowered to make such a contract on behalf of the United States. The agreement subsequently received the adherence of various Allied Governments, and more particularly of that of His Majesty.

When this agreement was entered into Norway had undoubtedly a strong interest in obtaining from the Allied and Associated Powers, especially from the United States, an agreement for a full supply of the commodities which were necessary to her economic life and prosperity, but in Europe, too, there were supplies which she desired to obtain from the Central Powers, and this involved the maintenance of Norwegian exports in exchange and of seaborne traffic, probably in Norwegian bottoms as much as in German, for the purpose of transporting it. Equally important to her, perhaps more important still, was the observance of her obligations of neutrality and the avoidance of any voluntary discrimination between one combatant Power and another. On the other hand, though there is nothing in the record to furnish direct evidence on this point, their Lordships cannot without affectation ignore what must be common knowledge—that in the spring of 1918 the problem of intercepting contraband traffic between Norway and Stettin was one which presented to the Allies difficulties not attaching to the control of traffic in the North Sea. Their Lordships have been invited to hold that the object, or at least one object, of the stipulations of this agreement with regard to the export of herrings to Stettin was to induce the Norwegian Government in effect to do for the Allied Powers what they could not then do for themselves, and to secure by agreement restriction of the traffic in food within moderate limits. It may be so, but their Lordships cannot undertake to determine the meaning of a written agreement by considering the results which may follow from its terms. It is equally possible that its object was to enable Norway, by stipulations made by the Norwegian Government in the interests of the country, to find a profitable and secure outlet for a portion of her herring catch, to obtain by way of quid pro quo a corresponding supply of German manufactures, and above all, to silence any possible complaint from the Central Powers that an agreement had been made which involved discrimination against themselves. The agreement as a whole has compromise writ large upon the face of it. One stipulation answers another ; but who can now estimate the relative weight of each ? Their Lordships have no information before them which would be an adequate justification for giving to particular phrases a meaning based on the precise objects or the relative importance of the various clauses, and must perforce refer to the words used for their meaning.

---

(1) [1920] P. 177, 184, 185.

Again, in point of form, conventional terms relating to exports of Norwegian commodities from Norwegian waters would naturally be expressed as undertakings by the Norwegian Government, not as licences accepted by it from the hands of foreign Powers. A sovereign State, scrupulously mindful of the obligations of neutrality, and justly resolute to maintain its own dignity and independence, would be prompt to reject language which might imply the permission of another Power to take this or that action as to the goods to be shipped on board its own ships in its own ports; while, on the other hand, the United States could have no interest in imposing on Norway language suggesting the acceptance of permission from abroad, since for practical purposes the mere undertaking of the Norwegian Government was sufficient to ensure any results that were desired. It cannot, however, be denied that if, upon a sufficient inducement or by inadvertence, the Norwegian Government did, in truth, assent to language clearly expressing the grant of permission by the United States to export herrings in a certain measure from Norway, the matter was entirely within its competence and the language must be read as it stands.

Their Lordships accordingly turn to the wording of the instrument. Art. III., para. 1, is particularly material. It begins by a statement that, for considerations recited, "the Norwegian Government agrees to the following restrictions of her exports to the Central Powers or their allies, namely: "Norway will not export to the Central Powers or their allies foodstuffs of any kind except fish and fish products. Fish and fish products may be exported in quantities not to exceed 48,000 tons per annum export weight." And then, after defining "fish" and "fish products," it proceeds: "There shall be no export to Germany or her Allies of any oil or derivations thereof, of fish or of any marine animals. The quantity of fish and fish products which may be exported to Germany and her Allies shall not exceed 15,000 tons in any three months, and the amount which such export is more or less than 12,000 tons in any quarter must be deducted from or added to 12,000 tons the following quarter." Manifestly in form the whole of the article above quoted is an undertaking by the Norwegian Government, unless the two sentences containing the words "fish products may be exported" and "the quantity . . . . which may be exported" can be read as permissive words, uttered by the United States and conferring on Norway an American leave and licence to do certain things.

There is an observation to be made here which, though general, is of actual assistance. It is this: the language of this agreement, when it is the language of the United States, may be treated as being the language of His Majesty's Government, and, whatever its form, if it amounts in substance to a licence from the Crown covering the traffic now in question the appeals succeed. It would be pedantic and unworthy of the dignity of the Crown if their Lordships were to draw a distinction between the promise of a licence to the Norwegian Government and the possession of a licence from the Crown by the particular persons engaged in this adventure. Lord Ellenborough in *Usparicha* v. *Noble* (1) laid down a similar proposition.

If His Majesty's Government have given assent to a contract which, reasonably construed, involves permission to those engaging in this trade to carry it on free from the exercise of belligerent rights, those rights are waived and a Court of Prize cannot enforce them. The ultimate question before the President was: "Does the agreement, rightly construed, amount to a waiver of the belligerent rights of the Crown in regard to contraband trade of the kind in question?" Before their Lordships it is: "Have the appellants succeeded in establishing that the conclusion of the President in the negative was wrong?"

With the assistance of counsel their Lordships have examined every relevant word in this document, but it would be unprofitable to repeat at length the arguments on either side, as applied clause by clause and sentence by sentence. It often happens in questions of construction that the meaning of a passage will finally turn on the impression which it produces on individual minds, rather than on logical deductions or grammatical analysis. The word "may," twice used in the passage quoted, is at least indeterminate. Even if it were supposed to be a part of the agreement where the United States speaks, there is the question whether it means "you may export without interference from the Allies' cruisers" or "you may export without its being a breach of contract on your own part, that is without complaint on ours." To read it as meaning "Norway contracts not to export foodstuffs other than fish and fish products; these she may or may not export up to 48,000 tons, but she undertakes not to export more," is reasonable and more in accordance with the scheme of the article than to read it as meaning "Norway undertakes not to export foodstuffs other than fish, and the United States permit Norway to export from her own ports 48,000 tons of her own fish."

---

(1) 13 East, 332.

Thus Norway's agreement relates only to the excess of 48,000 tons, while as to that quantity it remains outside the contract and her original freedom of action is unaffected. The Allies, on the other hand, accept the obligations which Norway imposes upon herself as sufficient, and there is no stipulation on their part which restricts their right to interfere with this traffic. This likewise is left outside the agreement and unaffected. The President's conclusion is in favour of the former reading. It is true that there is a later passage, which runs: "Nothing herein contained shall be construed to authorise or permit the exportation to Germany or her Allies of pyrites in any form except pyrites cinders," but this is a denial of a licence, not the grant of one, and all that can be said is that if these words contemplate a licence by the United States to Norway, which need not be decided, the parties showed that their vocabulary contained much more apt words—namely "authorise" and "permit"—than a mere "may," which is adapted to either purpose.

Although objection may be well taken in some respects to his reasoning, their Lordships are unable to say that the construction adopted by the learned President was wrong, or that he ought to have been satisfied that the belligerent rights of the Crown had been waived. Reading the agreement as a whole, the construction which is most consistent with its language, in their Lordships' opinion, is one by which each contracting party undertakes certain specified obligations—namely, on the part of the United States, to furnish to Norway certain supplies, and on the part of Norway, to place restrictions on her exports to the Central Powers. In

J. C.
1921
THE RANNVEIG.

other respects the rights of each party remain unaffected. Norway neither obtains nor requires a right for her subjects to ship and carry contraband; the belligerent Powers make no release of their right to capture contraband.

There remain but two minor points. It is said that after the armistice it cannot be presumed that Stettin was still a military or naval base of supplies, as during actual hostilities it had so often been found to be. The answer is that the record contains no evidence of any change and that the armistice was an armistice only and quite consistent with the maintenance of the German organizations in view of a possible renewal of hostilities. The other contention is that the shipowners acted in good faith (which is not denied) and reasonably read the agreement as permissive, and therefore should not suffer condemnation of their ship. Their Lordships think that those who know all the material facts, as these shipowners did, and rely on a reading of a written instrument, which proves to be wrong, do so at their peril. They can no more rely on such an error than upon ignorance of the law. If they read it aright they were in the right; not having done so, they are in the wrong. They carried a complete cargo of conditional contraband bound to an enemy base of supplies with their eyes open, and the usual consequences follow.

The Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the shipowners: *Botterell & Roche.*
Solicitors for the cargo owners: *Waltons & Co.*
Solicitor for respondent: *Treasury Solicitor.*

[PRIVY COUNCIL.]

GOUT AND ANOTHER . . . . APPELLANTS;

AND

CIMITIAN . . . . RESPONDENT.

J. C.*
1921
Nov. 17.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT FOR EGYPT (CAIRO).

Cyprus—British Nationality—Orders in Council—Order interpreting earlier Proclamation—" Resident "—" Ordinarily resident."

By an Order in Council made on November 5, 1914, Cyprus was annexed, and by a Proclamation made thereunder on March 3, 1915 (revoking an earlier Proclamation), it was provided that " all Ottoman subjects resident in Cyprus on November 5, 1914, have become British subjects." An amending Order in Council made on November 27, 1917, after reciting that doubts had arisen as to the effect of the Order and the proper interpretation of the Proclamation ordered that the following persons (inter alios) should be deemed to have become British subjects by virtue thereof: " any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 5, 1914."

The respondent, an Ottoman subject by birth, carried on business in Cairo from 1893 to 1913. In December, 1913, he went to Cyprus, and after three or four months brought his family there. He rented a house in Cyprus monthly, and while there discontinued his business in Cairo. He was present in Cyprus on November 5, 1914, and remained there until October, 1915, when he returned to Cairo, his family following in December. He received a passport describing him as a British subject, and was so registered at the British Consulate at Cairo, but after annual renewals registration was refused in 1919. He sued for a declaration that he was entitled to registration:—

Held, that if there were any difference between " resident " and " ordinarily resident " the latter became the test by virtue of the interpretative Order of 1917; but that on the facts the respondent was both " resident " and " ordinarily resident " in Cyprus on November 5, 1917, whether or not Cyprus was then his domicil; and that, whatever may have been his motive for going there, he was a British subject by virtue of the Order in Council.

APPEAL from a judgment of His Majesty's Supreme Court for Egypt (Cairo), delivered on January 2, 1920.

The main question for determination was whether the respondent, an Ottoman subject by birth, had become a

---

* *Present*: LORD SUMNER, LORD PARMOOR, LORD WRENBURY, LORD CARSON, and SIR ARTHUR CHANNELL.

British subject by virtue of certain Orders in Council and Proclamations made in connection with the annexation of Cyprus. The facts and the terms of the Orders and Proclamations appear from the judgment.

The Supreme Court held that the respondent was "resident" in Cyprus on November 5, 1914, and became a British subject by virtue of the Proclamation of March 3, 1915. It was however found that he was not "ordinarily resident" there on that date within the meaning of the Order in Council of 1917. It was also held that the respondent was not entitled to be registered as a British subject by virtue of art. 159 (2.) of the Ottoman Order in Council, but it became unnecessary for their Lordships to deal with that question.

1921. Oct. 18. *Giveen* (*Sir Gordon Hewart A.-G.* with him) for the appellants. The Proclamation of November 5, 1914, was revoked by that of March 3, 1915, and does not affect the present question. The test to be applied is whether the respondent was "ordinarily resident." The Order in Council of 1917 was interpretative of the Proclamation of March 3, 1915, and provided retrospectively that "resident" in it was to be read as meaning "ordinarily resident"; there was no future effect which could be given to the Order. The effect was not to take away a right acquired but to define the facts giving rise to the right: *Attorney-General* v. *Marquis of Hertford* (1); *Attorney-General* v. *Theobald* (2); *In re Lovell & Collard's Contract.* (3) The Court rightly held on the facts that the respondent was not "ordinarily resident." He was not a "resident" in Cyprus at all, but a mere sojourner there. The right of nationality is a permanent right, presumably therefore residence of a permanent nature was intended as the qualification. In international law it is a person's domicil in conquered territory which renders him a subject of the conquering sovereign: Halleck, 4th ed., pp. 508, 509; Hall, 7th ed., pp. 611, 612.

Holman Gregory K.C. and *Bowstead* for the respondent

(1) (1849) 3 Ex. 670.
(2) (1890) 24 Q. B. D. 557.
(3) [1907] 1 Ch. 249.

and cross-appellant. The respondent was resident in Cyprus on November 5, 1915, and having given no notice under clause 2 of the Proclamation of March 3, 1915, became a British subject. He could not be deprived of the right so acquired by the Order in Council of 1917. But even if that Order provides the test, he was on the facts "ordinarily resident." The words should be given their natural meaning, and should not be treated as if domicil were the test. The respondent was not "ordinarily resident" elsewhere than in Cyprus on November 5, 1915.

Giveen replied.

Nov. 17. The judgment of their Lordships was delivered by

LORD CARSON. The only question to be decided in this case is whether the plaintiff became, as he claims, a British subject by virtue of the Cyprus Annexation Order in Council, 1914, and the Proclamations and Order in Council issued thereunder.

The action was brought by the plaintiff against the defendant, Mr. Gout, His Majesty's Vice-Consul, who was at all material times acting Consul at Cairo, and the defendant, Mr. Geary, who is now His Majesty's Consul at Cairo, claiming a declaration that the plaintiff, his wife and children were entitled to the renewal of their registration in the register of British subjects kept in the office of the Consulate at Cairo.

The plaintiff was born at Kaiserie, in the Ottoman Dominions, on March 7, 1878, of Ottoman parentage, and he lived at Kaiserie until the year 1893, when he came to reside in Cairo. He carried on business in Cairo as a tobacco merchant from 1893 to 1913. He went to Cyprus in December, 1913, according to his own evidence, because he was ill, and went for a change to Nicosia and stayed there twenty-three months. He was ill for three or four months, and after three or four months he brought his family there and remained there for twenty-three months. While there he used to send wine to his brother in Egypt. He rented a house monthly. During his absence from Egypt his business there was discontinued.

J. C.
1921
Gout
v.
Cimitian.

Whilst the plaintiff and his family were in Cyprus, the Cyprus Annexation Order in Council was made on November 5, 1914, whereby it was ordered that from and after the date thereof the Island of Cyprus should be annexed to and become part of His Majesty's Dominions, and the said island was annexed accordingly. On the same day a Proclamation was issued by the High Commissioner for Cyprus relative to the British nationality of Ottoman subjects born and then resident in Cyprus, whereby it was proclaimed that: "under and by virtue of the said Order in Council the following provisions have effect: (1.) Ottoman subjects born in Cyprus and now resident in Cyprus are British subjects. (2.) Ottoman subjects not born in Cyprus are allowed one year from the date of this proclamation within which to leave Cyprus. Ottoman subjects mentioned in this proclamation who do not leave Cyprus within the said period of one year will, on expiration of the said year, be British subjects."

That Proclamation was revoked by a subsequent Proclamation by the High Commissioner, dated March 3, 1915, whereby he proclaimed that: "Under and by virtue of the said Order in Council the following provisions have effect: (1.) All Ottoman subjects resident in Cyprus on November 5, 1914, have become British subjects. (2.) Any Ottoman subject resident in Cyprus on November 5, 1914, desiring to retain Ottoman nationality may by notice under his hand elect to do so within one month of the coming in operation of this proclamation, and any such person electing so to do must leave Cyprus within two months after the date of his election and take up his residence elsewhere, failing which he would be treated as a British subject."

The plaintiff and his family continued to reside in Cyprus after the issue of that Proclamation until the month of October, 1915, without having given any notice, as mentioned in art. 2 of the said Proclamation. He then returned to Cairo, having received from the High Commissioner for Cyprus a passport, in which he was described as a British subject, and on October 4 he was registered as a British subject in

His Majesty's Consulate at Cairo, and a certificate of registration signed by the defendant, Mr. Gout, was issued to him. Later in the year, in the month of December, his wife and his son also returned to Cairo, and were duly registered as British subjects in the said Consulate and their names indorsed on the said certificate of registration. The registration seems to have been duly renewed on January 22, 1916, January 12, 1917, and January 10, 1918. He seems also on his return to Cairo to have resumed his business.

On November 27, 1917, the Cyprus Annexation Amendment Order in Council, 1917, was made, and after reciting the said Proclamation on March 3, 1915, proceeded as follows: "And whereas doubts have arisen as to the effect of the said Order in Council of November 5, 1914, upon the nationality of Ottoman subjects who were in Cyprus on the date thereof and as to the proper interpretation of the provisions of the said Proclamation regarding the grant of British nationality to Ottoman subjects resident in Cyprus at that date"; it is then ordered as follows: "The following persons shall be deemed to have become British subjects under and by virtue of the Cyprus Annexation Order in Council, 1914, and the Proclamation of the High Commissioner of March 3, 1915. (1.) (*a*) Any Ottoman subject who was ordinarily resident and actually present in Cyprus on November 5, 1914."

In January, 1919, the plaintiff applied to the defendant, Mr. Gout, for renewal of registration as a British subject, and was refused, whereupon the plaintiff commenced this action, as before stated. The case was tried in His Britannic Majesty's Supreme Court for Egypt at Cairo, and judgment was given on January 2, 1920. The acting judge found as a fact that the plaintiff was "resident" in Cyprus on November 5, 1914, within the meaning of the Proclamation of March 3, 1915, but held also that he was not "ordinarily resident" there within the meaning of the Order in Council of November 27, 1917. He held, however, that the plaintiff became a British subject under the first Order in Council and the two Proclamations already referred to. From that judgment the defendants have appealed, and a cross-appeal

J. C.
1921
GOUT
v.
CIMITIAN.

has been entered by the plaintiff against the finding that he was not "ordinarily resident" in Cyprus.

It has been argued before us that upon the facts as stated the plaintiff was not "resident" in Cyprus on November 5, 1914, within the meaning of the Proclamation of March 3, 1915, and also was not "ordinarily resident" within the meaning of the Order in Council of May, 1917. Their Lordships are of opinion that, if there is any difference between "resident" and "ordinarily resident," the case must be decided in accordance with the terms of the Order in Council of 1917, which was meant to correct any doubts as to the meaning of the previous Proclamations, and that that Order in Council must be given effect to so far as it corrects or changes the previous Proclamation. The appellants contended that in construing the Order we ought to apply the same consideration as in determining the case of domicil, but their Lordships are of opinion that the words "ordinarily resident" cannot be interpreted by such considerations and must be given their usual and ordinary meaning. The plaintiff was no doubt present in Cyprus on November 5, 1914, as required by the Order in Council; he had been there with his family for several months, and although he went there originally because he was ill, and wanted the change of air, he had stayed on and brought his family to live with him after he had recovered, and he continued to live there for nearly a year after the annexation, carrying on business there, and took no steps under the Proclamation or Order in Council to retain his Ottoman nationality. Under these circumstances their Lordships are of opinion that the plaintiff was "ordinarily resident" and "actually present" in Cyprus on November 5, 1914, and has consequently made out his case that he is a British subject. The acting judge at the trial states that it was officially brought to his notice that the plaintiff had in fact not gone to Cyprus in December, 1913, for his health, but that he had been deported from Egypt for being engaged in running contraband—i.e., hashish. No evidence was given of the order of deportation or for what period it was to be enforced, but their Lordships are of opinion that the motive which caused him to leave Cairo and take up his residence in Cyprus is immaterial to the questions which they are called upon to decide.

There were other questions argued before the trial judge relating to the power of the Court to issue a writ of mandamus to the defendants, they being consular officers, and as to the propriety of the issue of such a writ. These questions were, however, left undecided by the trial judge, and the Board is not asked to express any opinion upon them.

Their Lordships are of opinion that the appeal fails and should be dismissed, and that the cross-appeal against the finding that the plaintiff was not "ordinarily resident in Cyprus" should be allowed, and they will humbly advise His Majesty accordingly. There will be no order as regards the costs.

Solicitors for appellants and respondent : *Treasury Solicitor*.

[PRIVY COUNCIL.]

J. C.*
1921
Nov. 22.

EGYPTIAN BONDED WAREHOUSES COMPANY, LIMITED . . . . APPELLANTS;

AND

YEYASU GOSHI KAISHA AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE PRIZE COURT, EGYPT.

Prize Court—Jurisdiction—Incidental Matters—Absence of Jurisdiction after Release—Third-party Procedure.

The Prize Court has incidental jurisdiction in matters depending upon the question prize or no prize, also so far as is necessary to enable it to keep control over the captured ship or goods, pending the decision whether or not they are lawful prize ; this incidental jurisdiction ends however when an order for release has been made.

---

* *Present :* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

The Prize Court Rules do not directly, or indirectly by Order XLV., provide for the joining of a third party on a claim by a defendant to an indemnity.

Judgment of the Prize Court reversed.

APPEAL from a judgment dated April 21, 1920, of His Majesty's Supreme Court, Egypt, exercising Vice-Admiralty jurisdiction in prize.

The facts giving rise to the appeal appear from the judgment of their Lordships.

1921. Oct. 27, 28. *R. A. Wright K.C.* and *Hon. S. O. Henn-Collins* for the appellants.

D. Stephens K.C. and *Balloch* for the first respondents.

Sir Gordon Hewart A.-G. and *Bowstead* for the respondent, the Marshal.

Nov. 22. The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL. This is an appeal from His Britannic Majesty's Supreme Court in Egypt, exercising jurisdiction in prize. The appellants, the Egyptian Bonded Warehouse Co., Ld., are an Egyptian company who were employed by the Marshal of the Prize Court to warehouse goods which came into his charge as Marshal. The first respondents are a Japanese firm, who claimed, as owners, 171 cases of aniline dyes which had been part of the cargo of the German steamer *Lutzow,* seized as prize within the district over which the Prize Court of Egypt had jurisdiction, and placed in charge of the Marshal of the Court, and by him warehoused with the appellants.

On October 4, 1915, the Japanese firm (the first respondents) obtained from the Prize Court an order for the release to them of the 171 cases which they had claimed. It will be necessary to state hereafter in greater detail what was done upon this order, but the result was that through the mistake of some one, 150 out of the respondents' 171 cases got shipped to England instead of to Japan, as they had desired and directed. On December 27, 1916, the first respondents, by a writ issued out of the Supreme Court, and entitled "Vice-Admiralty Jurisdiction in Prize," commenced proceedings to recover damages from the Marshal for alleged negligence in respect of the 150 cases. There was some delay in proceeding with the action owing, perhaps, to the fact that the then Marshal, Mr. Wallis, died, and on February 8, 1918, the writ was amended by striking out his name, leaving it as a writ against the Marshal of the Court, without naming the successor in the office. By this time the defence of the Marshal had been taken up by His Majesty's Procurator-General in Egypt, presumably for the reason that negligence being alleged against a public officer in the execution of his duty, it was right that the action should be defended at the public expense, and especially as the individual then holding the office could not be personally responsible for any default of his predecessor.

On March 8, 1918, the Procurator-General, acting on behalf of the Marshal defendant, issued from the Court, and procured to be served on the appellants, a third-party notice, stating that the defendant claimed to be indemnified by the appellants on the ground that the negligence complained of was committed by the appellants as his agents, and giving notice to the appellants to enter an appearance if they wished to dispute the plaintiffs' claim in the action, and that in default of appearance they would be deemed to admit the validity of any judgment, and their liability to indemnify. The appellants did not enter an appearance, taking the view that the Prize Court had no jurisdiction to issue the notice. Their main ground appears to have been that as Egyptian subjects they could only be sued by a foreigner in the Mixed Court, and they must have given some notice of these contentions, for the next proceeding was an argument, before Mr. Peter Grain, one of the judges of the Court, on the point of jurisdiction. The appellants were not represented, but the plaintiffs in the action appeared by counsel, and the Procurator appeared for the Marshal. Both appeared to have argued in support of the jurisdiction.

On June 28, 1918, the Judge delivered judgment to the effect that the Prize Court had jurisdiction. On this the appellants (by leave, necessary owing to the time having

J. C.
1921
EGYPTIAN BONDED WAREHOUSES CO. v. YEYASU GOSHI KAISHA.

expired) entered an appearance under protest, and the case was tried, with the result that judgment was given for the plaintiffs in the action for damages, the amount to be ascertained by an inquiry, which was directed; and for the Marshal, as against the third parties, that he was entitled to be indemnified by them. From this judgment the appellants appeal to this Board, on the ground that the Court had no jurisdiction to entertain and decide on the third-party notice, and also that even if it had, the decision was wrong on the merits. The Marshal also entered an appeal, but on petition by him to this Board he was, on February 7, 1921, struck out, as appellant, and made a respondent on the terms that his argument was to be restricted to his claim to be indemnified by the appellants.

The only appeal now before the Board, therefore, is that of the Bonded Warehouses Company against the judgment, holding them liable to indemnify the Marshal against the claim of the Japanese firm, and the main question for consideration is whether the Prize Court has jurisdiction to decide any such matter. The interlocutory judgment delivered by Grain J. goes through and quotes the authorities which show that a Prize Court has jurisdiction over the incidents as well as the principal matter of prize, but he does not refer to the facts of the present case, nor say why he considered they brought the case within the rule which he laid down. It is possible that the facts had not then been brought fully to his knowledge. It must, however, have been clear that the complaint was about matters which had arisen after the release of the goods. The communications which passed immediately after the release were proved at the subsequent trial and are summarised in the final judgment. They were in writing, except that there were a few telephonic communications, the effect of which appears by the letters which are set out in the record. The order of release dated October 5, 1915, was formally drawn up, and was on October 6 sent in a letter from the advocates acting for the claimants in prize to the appellants, the Warehouse Company. That company carried on business not only as warehousemen, but also as forwarding and shipping agents, and the letter of October 6 gave directions to the company to take delivery of the goods released, and to arrange for their shipment to Japan.

Further letters passed as to further information which the appellants required in order to be able to ship the goods. The order of release was returned, in order that the advocates might get an addition to it which would prevent difficulties with the Customs authorities, and facilitate the shipping. The correspondence from the first shows that the appellants accepted the directions given to them, and agreed to hold for their owners the goods to which the release related, and which were described in a schedule to the order by the marks on them. The Warehouse Company, however, kept no books distinguishing for whom they held goods, or even showing what they had in stock, and this the trial judge very naturally held to be negligent. It seems to have been the practice for the Marshal to give to the Warehouse Company documents called delivery orders, directing the company to hold to their own order goods in their warehouse then standing in his name. This seems to have been done when it was proposed to send goods away to show that the Marshal had no further claim, and as an authority to deal with the goods as forwarding agents. Such a document was given on October 18 in reference to the 171 cases which had been released but it does not mention the release, or the name of the plaintiffs, or of their advocate to whom the order of release had been given. It was in precisely the same terms as a document which had been given on October 14, intended to relate to goods which had been condemned and which it was proposed to ship to England, and in respect of which the Warehouse Company was to act as shipping agents for the Marshal himself. These documents appear to have been given at the request of the Warehouse Company, when it was desired to deal with the goods, but it is clear that they were treated as mere matters of form, and that the Company did not wait for such orders to be given before they accepted directions for shipment. The document of October 14 was the cause of the trouble, because the list attached to it included, as well as the mark of condemned goods, the marks of 150 out of the 171 cases which had been released to the plaintiffs. The case of the Marshal is that he employed the company to make out this list, and merely put his signature to it when presented to him for signature. This is the basis of his claim for indemnity. The goods named on it were not shipped until October 27, but then they were, and no comparison of the lists having been made the 150 cases were included in the shipment. On October 16, before the shipment, and when the goods were still in their warehouses, the company had written to the advocate of the plaintiffs a letter distinctly accepting his orders as to the disposal of the 171 cases, but there was further delay in shipping the plaintiffs' goods, as there was a prohibition against exporting aniline dyes from Egypt, and it was necessary to get dispensation for these goods and it was not until December 4, when all these difficulties were removed, and the goods were about to be shipped, that the mistake was discovered.

On these facts their Lordships are clearly of opinion that before the cause of complaint of the plaintiffs arose not only had the 171 cases been released to them by order of the Court but the release had been acted on by attornment if that last step was necessary to prevent their ceasing to be prize goods. They had, in fact, in their Lordships' view ceased to be prize goods.

Passing now to the authorities on the jurisdiction of the Prize Court, the most important are referred to in the judgment of Grain J. What they show is that the Prize Court has exclusive jurisdiction over the question of prize or no prize, and also over all questions which depend for their proper determination on the question of prize or no prize, the reason being that prizes are acquisitions jure belli and that jus belli is to be determined by the law of nations, and not by the municipal law of any country. Thus in *Le Caux* v. *Eden* (1), it was held that an action for false imprisonment for detention of a passenger on a ship alleged

(1) (1781) 2 Doug. 594.

J. C.
1921
EGYPTIAN BONDED WAREHOUSES CO.
v.
YEYASU GOSHI KAISHA.

to have been wrongfully captured in war could not be entertained by a common law Court, because it could not decide the question of rightful or wrongful capture. In that case the whole question was discussed very fully, and with great learning. So the claim for freight on a voyage interrupted by capture, and continued to a different port by direction of the captors, can only be dealt with in the Prize Court, for the right to the freight contracted for for the intended voyage is lost by the non-completion of that voyage, and the only freight which could be recoverable would be that which the Prize Court might award, applying its rules to the particular circumstances of the capture, on which it alone could adjudicate. This was held in *The Corsican Prince* (1) and the decision on that point was approved by this Board in *The St. Helena* (2), although there the appeal was allowed on other grounds. This doctrine as to prize jurisdiction over what are called incidental matters, meaning matters which depend for their decision on prize or no prize, is well established, but it obviously has no application to the present case, where the claim for indemnity in no way required the consideration of any question of prize law or international law for its determination. The Prize Court also has the incidental jurisdiction which is necessary to enable it to keep control over the captured ship or goods, pending the decision whether or not they are lawful prize, in order that the Court may be able to deliver them to whomsoever they may decide to be entitled. The learned judge in this case quotes a passage from Story on Prize Courts (Pratt's Story, ed. 1854, pp. 30 and 31) (also quoted by Sir Samuel Evans in *The Corsican Prince* (1)), stating that the Prize Court will follow prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title. "It may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject matter." In a note to Story at the end of the passage quoted there is a reference to *Home* v. *Earl Camden* (3), where the

(1) [1916] P. 195.
(2) [1916] 2 A. C. 625.
(3) (1795) 2 H. Bl. 533.

House of Lords reversed a decision of the common pleas, granting a prohibition, in respect of an order made after sentence of condemnation by the Prize Court, but before an appeal from the sentence to the Commissioners of Appeal in Prize had been disposed of. In that case many points were argued, but on this point the judgment proceeded on the view that owing to the appeal the property had not finally vested, and therefore there was jurisdiction. If there had been no appeal (and there has been no appeal from the release in the case now before the Board) it would seem that there could have been no jurisdiction after sentence.

Grain J. concludes his judgment by saying that the Prize Court can follow prize goods through all incidents or torts concerning them, and " its jurisdiction continues so long as anything remains to be done touching the subject matter." He must, therefore, have thought that the tort complained of in this case had been committed whilst something remained to be done in the matter, whereas the further investigation of the facts at the trial seems to their Lordships to show that that was not so. There are matters of form in the procedure of the Prize Court here which must not be lost sight of. If the decision of the Court against the Marshal is based on the disciplinary jurisdiction of the Court over its officer, the usual way of commencing proceedings would be for the party aggrieved to call on the Court by motion to exercise its jurisdiction, and not by issuing a writ for damages against the Marshal. It was probably the issuing of the writ which led to the idea that a third-party notice might be issued, but there is no trace of any such practice in the Prize Court. There is nothing in the Prize Court rules here, which it is stated were adopted in the Court in Egypt, providing for the calling in of third parties against whom the right of indemnity is claimed, and as it is a new practice introduced by the Judicature Acts, it cannot be incorporated by Order XLV., providing for the old practice of the High Court of Admiralty in Prize being followed in cases not provided for by the new rules. Their Lordships, however, would not desire to base their decision in this case on any matter of form. They base it on the broad view that there is no jurisdiction in the Prize Court to decide as between parties, some of whom have not been parties to the prize proceedings, disputes not involving the consideration of the jus belli, and arising on facts which have occurred after an effective release of the goods to a claimant. Their Lordships decide nothing as to the judgment against the Marshal, as there is no appeal against it, and of course nothing as to the right to indemnity, or as to the question of contribution between tortfeasors which the appellants desired to raise on the appeal.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Prize Court against the third parties, including, of course, the order for costs, should be set aside, and that the appellants should have their costs of the appeal paid by the second respondent, and that the first respondents should bear their own costs of the appeal.

Their Lordships propose to make no order to give the appellants their costs in the Court below, as the costs there would mainly have been occasioned by the dispute as to the indemnity decided against the appellants on the facts, and it would involve a difficult taxation to apportion the costs in the Court below properly payable by each party.

Solicitors for appellants: *Vallance & Vallance.*

Solicitors for respondents: *Lattey & Hart; Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1921
Oct. 21.

KHAW SIM TEK AND OTHERS . . . . APPELLANTS;

AND

CHUAH HOOI GNOH NEOH . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Limitation—Will—Trust—Suit to avoid Trust and to recover on Intestacy—Period from which Limitation runs—Limitation of Suits Ordinance VI. of 1896, *Str. Sett.*), *s.* 10; *Sch.* II., *art.* 99.

A Chinese resident in the Straits Settlements, who died in 1882, provided by his will that a specified share of his residuary estate should be "kong lin" (a Chinese expression meaning rotation in common) for yearly and other sacrifices, and that upon the expiration of sixteen years from his death it should become his sons' and grandsons' "kong lin" for sacrificial purposes. On February 25, 1916, one of the next of kin sued the trustees, claiming to avoid the gift of the share and to recover as upon an intestacy in respect of it. Accounts had been prepared by the executors on January 15, 1904, in which a full and proper allocation of the share in accordance with the will was provided for.

By the Limitation of Suits Ordinance (VI. of 1896), Sch. II., art. 99, the period of limitation in the case of a suit for a distributive share of the property of an intestate is twelve years from the period when the share becomes payable. By s. 10 ". . . . no suit against a person in whom property has become vested in trust for any specific purpose . . . . for the purpose of following in his . . . . hands such property shall be barred by any length of time":—

Held, that s. 10 of the Ordinance did not apply to the suit, and that the period when time began to run was not postponed till a Court had avoided the trust; and consequently that the suit was barred by art. 99, whether time ran from the date of the testator's death, from sixteen years after his death, or from the time when the estate was ready for division.

In s. 10 "a specific purpose" means a purpose which is either specifically defined in the will or settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.

Balwant Rao v. *Puran Mal* (1883) I. L. R. 6 All. 1 approved.

Salter v. *Cavanagh* (1838) 1 Dr. & Wal. 668 distinguished.

Judgment of the Supreme Court reversed.

APPEAL from a judgment (August 12, 1919) of the Supreme Court of the Straits Settlements, Penang, affirming a judgment of Woodward J.

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON, and LORD CARSON.

The suit was brought by the respondent on February 25, 1916, in the Supreme Court and related to the estate of one Khaw Soo Cheang, a Chinese resident in the Straits Settlements who died in 1882; the executors of the will, represented by the appellants, were defendants. The respondent, one of the next of kin, by her plaint claimed a declaration that certain trusts, dispositions, and directions contained in the will were void, and that the part of the estate thereto allocated should be distributed as on an intestacy.

The facts including the material terms of the will, also the terms of the Limitation of Suits Ordinance (VI. of 1896), upon which the decision of the appeal depended, appear from the judgment of their Lordships.

The trial judge (Woodward J.) held that the gift to the "kong lin" was void as a perpetuity, that there was not an absolute gift charged with an invalid condition, and that there was an intestacy as to the "kong lin." He held that the suit was not barred by the Ordinance, because in his view time did not begin to run until the gift had been declared void by a competent Court.

The decision was affirmed on appeal. Ebden J. held that time did not begin to run until an intestacy was declared by a decree not subject to appeal. Sproule J. dissented from that view, but held nevertheless that the suit was not barred. In his view s. 10 applied. Maltby J. in substance agreed with Sproule J.

1921. Oct. 20. *Upjohn K.C.*, *F. B. Fuller*, and *W. E. Cleaver* for the appellants. The suit was barred by the Limitation of Suits Ordinance, 1896, Sch. II., art. 99, whether time ran from the death of the testator, from 1898, or from the time when the estate was ready for division. The view that time did not begin to run until a Court had set aside the trust is erroneous. The word "payable" in art. 99 is not confined to payment in the course of administration. Sect. 10 of the Ordinance does not apply. That section is in the same terms as s. 10 of the Indian Limitations Act

J. C.
1921
Khaw Sim Tek v. Chuah Hooi Gnoh Neoh.

(IX. of 1871), which it has rightly been held in India applied only to suits to enforce a trust specifically created: *Balwant Rao* v. *Puran Mal* (1); *Kherodomoney Dossee* v. *Durgamoney Dossee*. (2) An executor is not a trustee for the next of kin: *In re Lacy*. (3)

Disturnal K.C. and *Gavin Simonds* for the respondent. The suit was not barred by the Ordinance. If, contrary to the respondent's contention, art. 99 applies, the period of twelve years did not begin to run according to the terms of the article until the distributive share was "payable." The executors were bound by the directions of the will until the trust was set aside by a competent Court. Further, until the residue was ascertained no distributive share was payable: *Barnardo's Homes* v. *Special Income Tax Commissioners* (4); *In re Johnson*. (5) No residue was ascertained until May, 1904, when the beneficiaries entered into a deed defining their respective rights under the trust. But having regard to s. 10, the suit was not barred by any article of the schedule. The trust being void the executors were vested with the share of the residuary estate as trustees for the next of kin; that was a specific purpose within the meaning of s. 10: *Salter* v. *Cavanagh* (6); *Patrick* v. *Simpson*. (7)

Upjohn K.C. in reply referred to *Cooper* v. *Cooper*. (8)

Oct. 21. The judgment of their Lordships was delivered by

Lord Buckmaster. The real question that arises on this appeal is whether the respondent is disentitled by lapse of time from maintaining the proceedings which she instituted on February 25, 1916, for the purpose of obtaining (1.) a declaration as to the effect of a gift for yearly and other sacrifices contained in the will of a testator who died on May 25, 1882, and (2.) the distribution of the estate upon the footing that the gift was void and the property so given passed to the next of kin. The will is in Chinese form, and was made in 1874; the original has been lost, and there is nothing but a translation by a former interpreter of the Court in Penang by which it is possible to ascertain its contents. So far, however, as the critical question in this case is concerned, the translation, as it is before their Lordships, is adequate for the purpose. The testator provided that his property was to be dealt with by payment of a very large number of pecuniary legacies, and after they had been paid and satisfied, the residue was to be divided into sixty shares. As to sixteen of those sixty shares he directed that they should be the means of his maintenance during his lifetime, and should be "kong lin for yearly and other sacrifices" after his death. Both by clause 4 and by clause 22 of the testator's will it appears that he contemplated that this residue should be left undistributed for sixteen years. It is unnecessary for their Lordships to say definitely whether the directions that he imposed upon his executors in this respect were in the nature of a mere appeal to their discretion or created an imperative trust, since for the respondent's purpose the most favourable assumption is that the period of sixteen years was a definite period definitely fixed before which no division of the estate could take place, and for the purpose of this decision their Lordships will accept this view. At the expiration of sixteen years the testator declares by clause 22 that the income of the shares shall "begin to be my sons and grandsons (or grandchildren) kong lin for yearly sacrifices as well as for sacrifices in spring and autumn."

---

(1) (1883) I. L. R. 6 All. 1.
(2) (1878) I. L. R. 4 Cal. 435.
(3) [1899] 2 Ch. 149.
(4) [1921] 2 A. C. 1.
(5) (1885) 29 Ch. D. 964.
(6) 1 Dr. & Wal. 668.
(7) (1889) 24 Q. B. D. 128.
(8) (1874) L. R. 7 H. L. 53, 64, 65.

The plaintiff is the legal representative of a granddaughter of the testator, her grandfather, the testator's son, having died in the testator's lifetime. Her claim, therefore, is as the legal personal representative of one of the female next of kin of the testator, and in this capacity she instituted these proceedings, asking that the gift of these sixteen-sixtieths of the residue to the "kong lin" should be declared void and distributed among the next of kin. Among other answers to that claim the appellants urged that the right

J. C.
1921
KHAW SIM TEK v. CHUAH HOOI GNOH NEOH.

to bring the action is barred by virtue of the Limitations Ordinance which exists in the Straits Settlements. The ordinance in question is Ordinance No. 6, 1896. This provides by s. 4 that: "Subject to the provisions contained in ss. 5 to 25 inclusive, every suit instituted after a period of limitation prescribed therefor by the second schedule hereto shall be dismissed provided that limitation has been set up as a defence."

By Sch. 2 there is a provision in art. 99 that a suit for obtaining a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate cannot be maintained after the lapse of twelve years from the time when the legacy or share becomes payable or deliverable. Mr. Upjohn contended that in any circumstances that period must have elapsed before this suit was instituted. If it be taken from the date of the death, of course it is obvious that it has long gone by. If a further period of sixteen years be taken and the calculation is assumed to date from the period of division fixed by the testator for the estate, still the suit is out of time, for the period expired in 1898; but finally if it be taken, as has been urged on behalf of the respondent that it should be, at the period when the trustees had in accordance with the trusts of the will so dealt with the estate that it was ready for division, then again the plaintiff is out of time, for elaborate accounts were prepared on January 15, 1904, in which a full and proper allocation of the shares of the residue applicable for this rotation of the "kong lin" was set apart and fixed. Their Lordships think, therefore, that it is unnecessary for them to decide which of those three periods is the right one to fix, because whatever period may be taken the plaintiff is too late.

Their Lordships cannot support the view which appears to have found favour with the learned judge before whom the case was first heard that the time runs from the date when the clause is construed by a competent Court, nor that suggested by Ebden J. in the Court of Appeal that the time fixed is when the intestacy is declared by a decree established beyond appeal. The intestacy, if it exists, has existed throughout, and the distributive share of one of the next of kin has been his to claim from the time when the intestacy arose and not when it was declared. The probate gives no efficacy to the provisions of the will; it is merely proof of the contents, and their Lordships think Ebden J. was in error in saying: "When a will has been admitted to probate its provisions stand good unless and until they are avoided by the declaration of a competent Court." Such provisions could be ignored from the outset, and the declaration of the Court is merely as to how the will ought to have been construed throughout, nor is it necessary that "a suit to recover such a share would have to be preceded by a suit to attack the will."

But it is then urged that the exception referred to in clause 4 of the Ordinance of 1896, making the times in the Schedule subject to the provisions of ss. 5 to 25, enabled the plaintiff to maintain the suit because s. 10 provides that: "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time."

The contention is that in this case the property was vested in trust for a specific purpose, because in the event of the sixteen-sixtieths being declared to have been gifts for a purpose that failed, they became vested in the trustees' hands in trust for the next of kin, and in support of that contention reference has been made to the old and well-known case of *Salter* v. *Cavanagh* (1), which has been subsequently followed, though with some hesitation, in other authorities. So far as that case is concerned, apart from an argument as to the meaning of clause 22 of the will, it affords him no assistance, for the principle that underlies that authority is this: that if property be set aside by a testator from the general body of his estate and vested in

(1) 1 Dr. & Wal. 668.

trustees upon certain trusts, which upon the face of them are inadequate to exhaust the whole of the property, there remains as to the balance a trust impressed upon the trustees in favour of the next of kin or the heir at law, a trust for the purpose of which you have to do no violence whatever to the language of the will, for which it is unnecessary to disregard any intention or desire that the testator has expressed, for which it is only necessary to imply that when the testator knew, as he must have done, that the specific purpose to which the property had been devoted did not exhaust the whole trust estate, the balance would of necessity be held by the trustees for the heir at law or the next of kin.

In this case the only way in which the next of kin can, apart from clause 22, assert their position is by defeating the provisions that the testator has made in his will. It is only upon the hypothesis that those provisions are bad that his interest arises, and it is in the opinion of their Lordships impossible to say that in those circumstances the property was vested in trust for a specific purpose in which the next of kin was in any way interested. A specific purpose, within the meaning of s. 10, must, in their Lordships' opinion, be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. The statement which was made in the authority of *Balwant Rao* v. *Puran Mal* (1) that the purpose of following the property in the hands of the trustees referred to at the end of s. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section is in their Lordships' opinion a sound and critical test by which to consider whether or not any particular trust is within the provisions of the section.

Their Lordships therefore think that so far as the general claim of the next of kin is concerned on the hypothesis that the gift is wholly void, the Limitations Ordinance affords a complete and effectual bar, and this view appears to be in agreement with that of Sproule J.

(1) I. L. R. 6 All. 1.

J. C.
1921

KHAW SIM TEK
v.
CHUAH HOOI GNOH NEOH.

But it was then urged that there was an alternative view which arises upon the face of the will by which it may be said that the plaintiff was in fact entitled under the benefit of the trust contained in clause 22. This proposition was only raised at the end of the earlier argument, and certainly found no part in the original claim. There was therefore some technical difficulty in the way of the respondent, but their Lordships were anxious that a matter which had come from such a distance and is of such importance to the parties should not be imperfectly considered, and therefore they heard all that could be urged upon this later branch of the case, but in truth when it is examined there is very little that can be said. Clause 22 provides that at the expiration of sixteen years the shares "shall begin to be my sons and grandsons Kong Lin for yearly sacrifices as well as sacrifices in the spring and autumn." The copy of the will before us has the words "or grandchildren" added after the "grandsons," but whether or no that was the real interpretation of the word it seems difficult to ascertain, because the word in the previous clause 21, which has been the subject of interpretation and has been held to include grandchildren, has not necessarily the same meaning in clause 22, and their Lordships think there is much weight in the statement made by Ebden J., who must be much more familiar with the local circumstances than their Lordships can possibly be, when he pointed out that the sacrificial rites which are imposed upon the property and for which, under clause 22, the beneficiaries there mentioned are to use the estate, are rites for which the daughter is a useless person. To use the language of the learned judge, he says: "She is useless for the purpose of ancestor worship which requires male issue"; and he says again that "the phrase itself which was assumed to mean grandchildren, including daughters, might, on careful consideration, be shown only to mean sons and grandsons for the reason that daughters have no place in Chinese succession." This is a cogent argument to show that in clause 22 there never was any intention that a granddaughter should be included. If, however, the clause is capable of such a construction as the two other learned judges in the appellate Court appear to hold, there still remains the difficulty that the gift is not to the class beneficially, but to perform ceremonies which it is said render the gift void; so that even on this hypothesis the respondent is not seeking to restore the property to the trust but to take it away, and consequently s. 10 is inapplicable. It follows, therefore, that the respondent is unable to escape from the general effect of the Limitations Ordinance, and that this suit was instituted too late for it to be capable of being entertained by the Court before which it was brought.

For these reasons their Lordships will humbly advise His Majesty that the suit should be dismissed, that this appeal should be allowed with costs, and that the decree of August 12, 1919, except so far as it dealt with costs, should be set aside.

Solicitors for appellant: *Nisbet, Drew & Loughborough.*
Solicitors for respondents: *Rawle, Johnstone & Co.*

[1922] 1 A. C. 129.
Applied. Boy Andrew (Owners) v. St. Rognvald (Owners) [1948] A. C. 140

Observations of THE EARL OF BIRKENHEAD, at p. 144, *applied.* HOLLING v. YORKSHIRE TRACTION CO., LTD. [1948] 2 All E.R. 662.

Applied. Davies v. Swan Motor Co. [1949] 2 K. B. 291

[HOUSE OF LORDS.]

H. L. (E.)*
1921
Dec. 15.

COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM . . . . APPELLANTS;

AND

OWNERS OF S.S. VOLUTE . . . . RESPONDENTS.

Shipping—Collision—Contributory Negligence—Convoy—Omission to sound appropriate Helm Signal on altering Course—Maritime Conventions Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1 (*a*) (*b*).

Upon a question of contributory negligence as applied to collisions at sea, although, where a clear line can be drawn, the subsequent negligence alone is to be regarded, there may be cases in which the two acts of negligence come so closely together and the second act is so mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, may invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

The *V.*, as leader of a convoy under the charge of two destroyers, the *R.* and another, the *R.* being on the starboard hand, had instructions when to alter her course, and was to sound the appropriate helm signal on altering. Whilst sailing by night she was instructed to keep a certain course until reaching a particular point, and then to alter her course 7 points to the starboard, and this she proceeded to do. The *R.* did not immediately alter her course when the *V.* ported her helm and consequently a position of danger arose. On discovering the *V.'s* change of course to starboard the *R.* hard-a-ported, but her helm jammed, and she then increased her speed from 8 to 18 knots, with the result that a collision occurred, notwithstanding that the *V.* stopped and reversed her engines. In the opinion of the House of Lords on the evidence (reversing the finding of the trial judge), the *V.* did not sound the appropriate helm signal before porting:—

Held, that the collision was caused partly by the *V.'s* omission to signal and partly by the *R.'s* going full speed ahead after the position of danger brought about by the *V.'s* negligence, and that both vessels were to blame.

Decision of the Court of Appeal holding the *R.* alone to blame reversed.

APPEAL from an order of the Court of Appeal affirming a decree of the President.

The action was brought by the appellants against the respondents and arose out of a collision which occurred about

---

* *Present:* VISCOUNT BIRKENHEAD L.C., VISCOUNT CAVE, VISCOUNT FINLAY, LORD SHAW OF DUNFERMLINE, and LORD PHILLIMORE.

3.51 A.M. on April 12, 1918, off Oversay Light on the west coast of Scotland between His Majesty's destroyer *Radstock* and the respondents' steamship *Volute.*

The facts are fully stated in the judgment of the Lord Chancellor and are summarised in the headnote.

The President found that the *Volute* sounded an effective helm signal indicating her change of course and that she stopped and reversed her engines in time; that, apart from any signal, the *Radstock* could with a proper lookout have observed the movement of the *Volute* and could by taking proper measures have avoided the collision; that, when the change of course by the *Volute* was evident, she acted improperly in going full speed ahead and increasing her speed, although her helm was jammed, and that this action of the *Radstock* brought about the collision. He therefore held that the *Radstock* was solely to blame.

The Court of Appeal (Lord Sterndale M.R., Atkin and Younger L.JJ), without expressing any concluded opinion on the question whether the *Volute* blew a helm signal at the material time, held that even on the assumption that the signal was not blown the *Volute* was not to blame for the collision.

The appellants claimed that the *Volute* ought to be held alone to blame, or, in the alternative, partly to blame for the collision.

The appeal was heard with nautical assessors.

1921. Oct. 25, 27. *Raeburn K.C.* and *Balloch* for the appellants cited *The Hero* (1) and *Cork Steamship Co.* v. *Kiddle.* (2)

Daniel Stephens K.C., George Langton and *K. S. Carpmael* for the respondents.

Balloch replied.

The House took time for consideration.

1921. Dec. 15. VISCOUNT BIRKENHEAD L.C. My Lords, this action was brought by the Lords Commissioners of the

(1) [1912] A. C. 300.

(2) (1920) 2 Lloyd's List Rep. 505.

Admiralty against the owners of the steamship *Volute* for damage suffered in a collision between the *Radstock*, a destroyer, and the *Volute*, an oil tank ship, which occurred shortly before 4 A.M. on April 12, 1918, off the west coast of Scotland.

On the occasion in question, the *Radstock* was one of two destroyers in charge of a convoy of three oil tank vessels, and the ships were proceeding in this order. The *Volute* was the leading merchant vessel, having one of her consorts on the port hand and one astern. The *Radstock* was the escort on the starboard hand, and the *Undine*, another destroyer, was the escort on the port hand. The station distances between the merchant vessels were two cables and between the destroyers and the merchant vessels three cables. The *Volute* was made the leader of the convoy and had instructions when to alter her course. She was to be responsible for the alteration and was to sound the necessary short blast helm signals when altering course. She was directed to alter course to port a little before midnight, and she starboarded her helm and blew the appropriate signal of two blasts which was answered as intended by the other vessels of the convoy, and the course was altered without mishap.

On this altered course, N. 44deg. W., the vessels then proceeded till a particular bearing of the Oversay Light was reached, when it would be right for the course to be altered about 7 points to starboard, from N. 44 W. to N. 32 E., and this the *Volute* proceeded to do. She ought to have signified this very striking alteration by the blowing of a short blast of her whistle. Whether she did so was a serious matter in dispute at the trial. The night was dark, and no lights were being carried except that each vessel in the convoy carried a shaded stern light.

The *Radstock*, whose officer and crew said that they heard no whistle, did not alter course when the *Volute* ported her helm and the result was that a position of danger arose. Only the master of those on board the *Volute* was examined, and he, though awake and in the chart room, was not on the bridge till the last moment; your Lordships do not precisely know at what state and in what circumstances those on board the *Volute* realized that there was going to be a collision. But there was some evidence which will be dealt with later that she stopped and reversed her engines before the collision. She also pleaded that she hard-a-starboarded. Her master says that when he came to the bridge the helm was amidships, but it is hardly possible that she checked her port helm, as the collision is agreed at a right-angled blow, and the *Radstock*, though her helm jammed, had ported somewhat.

As far as the *Radstock* is concerned the evidence was that the first they knew of the approach of the *Volute* was a report about two minutes before the collision from the port lookout that the *Volute* was altering to starboard. She was then seen to be at a good distance—3 to 4 points on the port bow; the helm of the *Radstock* was altered hard-a-port, but jammed when it had got to 10 degrees, and the officer in charge then gave the order to increase the speed of the *Radstock*, which had been proceeding at the convoy speed of 8 knots, up to a speed of 20 knots. It was agreed that the two vessels came into collision at about right angles, the port side of the *Radstock* in the engine room, just abaft amidships, and the stem of the *Volute*, the *Radstock* having at the time of the collision attained to a speed of about 18 knots. Great damage was done to the *Radstock*, but she did not sink, and ultimately got into port.

As the trial of the case proceeded, it became clear that there were only two questions of fact in dispute, though there might be much discussion as to the actual or probable consequences of the various manœuvres. These two facts were whether the *Volute* did or did not blow a whistle as the appropriate helm signal, and whether she did or did not stop and reverse her engines and, if she did, when.

I will take the latter point first. It was urged on behalf of the *Volute* that she must have reduced her speed and reduced it considerably. Otherwise, with her momentum and a right-angled blow, and the not very stout scantling of the *Radstock*, she would have cut so far as to cause the *Radstock* to sink. This is a very unsafe point to rely on, unless there has been some careful scientific calculation of forces, and one of the assessors who assisted your Lordships has stated on consideration that he thinks no conclusion could safely be drawn from the fact that the *Radstock* was not sunk. But there is the evidence of the master of the *Volute*, who says that he heard the telegraph ring before the collision, and that of the captain of the *Radstock*, who says, in answer to Question 78: "The *Volute* appeared to me to be stopped, nearly stationary, and I believe going astern." It was suggested, and is possible, that as he came on deck on the impact he may have meant to refer to her action after the blow was struck, but upon the whole I think it would be safer for your Lordships to conclude that the *Volute* did stop and reverse her engines in sufficient time to save her from blame in this respect, particularly as this was the view both of the learned President who tried the case and of the members of the Court of Appeal.

As to the other issue of fact about the whistle signal, the matter stands in this way: The President believed that the signal was given and he therefore held the *Radstock* to blame. He also held that she was to blame for going full speed ahead. The judges of the Court of Appeal were evidently in great difficulty on the subject of the whistle. The Master of the Rolls dealt with the case on the assumption that the whistle was not sounded, while at the conclusion of his judgment he thought it best to express no opinion as to the conclusion of fact which the President came to on that point. The Lords Justices did not decide the point, but gave a very strong indication of their opinion that the whistle was not blown. It became unnecessary, however, in the opinion of all three members of the Court of Appeal, to come to a decided conclusion as to the whistle, because they thought that even if it was not blown, nevertheless the *Radstock* was to blame and alone to blame for the collision.

Your Lordships, after a careful examination of the evidence, are all, I believe, convinced that the signal was not given. The only witness for the *Volute* was the master. He no doubt said that the second officer, whom he had left in charge, had instructions to blow one blast, to listen to the other steamships to see that they answered before the course was altered and to port slowly, and that he in his chart room heard one blast blown and answered by the other steamships. He further says that after the impact he stopped his engines, which were working astern to keep the two ships together, and then, when he backed out, he blew three short blasts, the appropriate signal for going astern, no such signal having been given before the collision. There is no entry of any whistle signal in his log book.

On the other hand, seven witnesses were called from the *Radstock*, the officer of the watch, the captain, who was in the chart house and had just received a signal from the wireless operator and therefore was awake, the signalman, one of the lookout men, the helmsman, and two other seamen on deck, who all said that there was no port helm signal and no whistle blown till just after the collision, when there was a prolonged blast. Some of them also said, in agreement with what was said by the master of the *Volute*, that she blew three short blasts when she was backing out. Others did not mention these three blasts, but counsel for the *Volute* intimated in the course of the trial that he conceived what happened after the collision to be immaterial. There was an eighth witness, a leading seaman on deck, who did not speak to the long blast but only to the three short blasts. The learned President thought that this imported some discrepancy between the witnesses of the *Radstock*. I think your Lordships have failed to find any such discrepancy. There were no witnesses from either of the other convoy ships, but one witness, the officer of the watch, was called from the other destroyer. He was expecting a short blast. He never heard one, but he did hear a long blast, and as he expected the convoy to alter course about that period, he began to turn under his port helm, when he saw a Morse light flash as a signal from the *Radstock* and went up to her assistance. As he did not hear the shock of the collision all that he can say is that the long blast preceded the signal with the Morse lamp, and that it was the only signal he heard. The log books of the *Radstock* were put in and they did not help the case of the *Volute* on this point.

As the learned President said in his judgment that he believed that the witnesses from the *Radstock* came to tell the truth, the matter resolves itself into an inference which can be nearly as well drawn by your Lordships as if you had seen the witnesses yourselves. As I have already stated, there can be no doubt in your Lordships' minds, when the matter comes to be carefully considered, that the conclusion on this point at which the learned President arrived was incorrect. And here it should be observed that though the destroyers were supposed to look after themselves and the convoy ships to pay no attention to their movements in a general way as they might wish to range ahead or astern, converge or diverge, yet the captain of the *Radstock* had protected himself by instructing the other vessels of the convoy to answer the signal of the *Volute* and was entitled, therefore, to expect a triad of short blasts. In fact no blasts were sounded. Your Lordships will therefore, I apprehend, hold that the *Volute* was negligent and to blame in not blowing a short helm blast. Whether it was negligence which should be held in law to have contributed to the collision or not was a matter of greater difficulty.

As regards the alleged negligence of the *Radstock*, the President, while exculpating her on the charges of not stopping and reversing, did, with the concurrence of his assessors, find her to blame for increasing her speed, which, as has been stated, reached 18 knots at the time of the collision. The Master of the Rolls, with the concurrence of the Lords Justices and following the advice of their assessors, came to the same conclusion, and your Lordships have been advised by your assessors to the same effect. There is no doubt that the officer in charge was influenced by the fear lest he should be struck forward, where he carried depth charges, or in the boiler room. But it seems that if he had not increased his speed there would have been no collision at all; and though no doubt he was put in a position of some difficulty by the action of the *Volute* in porting and bringing herself on a crossing course without whistling, it is, in the eyes of all nautical men who have dealt with this matter, so patent that it was wrong to put the engines full speed ahead, that your Lordships cannot do otherwise than agree with both Courts below and hold the *Radstock* at least partly to blame for the collision.

The matter therefore rests in this way. On the one hand, if the *Volute* had signalled or had postponed her porting unless and until she signalled there would have been no collision. On the other hand, if the *Radstock* had not gone full speed ahead after the position of danger brought about by the action of the *Volute*, there would have been no collision.

In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full : see among other cases *Spaight* v. *Tedcastle* (1) and *The Margaret.* (2)

At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails : *The Bywell Castle* (3) ; *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (4)

In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

Lord Blackburn, in *The Margaret* (2), was of opinion that the area of this middle space was the same for Admiralty as for common law, and his opinion may be accepted subject to a possible qualification arising out of the subsequent passing of the Maritime Conventions Act, 1911.

(1) (1881) 6 App. Cas. 217.
(2) (1884) 9 App. Cas. 873.
(3) (1879) 4 P. D. 219.
(4) (1880) 5 App. Cas. 876.

How, then, are its limits to be ascertained? Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negligence is contemporaneous? Is it to be the rule that in all cases if the tribunal can find a period at which A.'s negligence has ceased and after which B.'s negligence has begun that then the negligence of A. is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few.

If two roads intersect each other at right angles and there is a large building at the point of intersection, and two people are running or riding or driving at a reckless pace, one down each street, and meet at the corner, it would be easy to say that both were in fault and equally so. If the courses of two motor-cars cross and there is no rule of the road such as that at sea requiring one to give way and the other to keep her course, and both hold on, both are equally to blame. In *The Margaret* (1) a badly navigated barge came into collision with a schooner which was improperly carrying her anchor over her bows in a dangerous way, contrary to the rule. An impact ensued which would have done no damage but for the fact that the fluke of the anchor knocked a hole in the barge. Sir Robert Phillimore put the whole blame on the badly navigated barge, but the Court of Appeal thought that though the collision was solely due to her the damage was due to both, and divided it.

But even this class of case was varied by the subsequent decision of Gorell Barnes J. in *The Monte Rosa* (2), where he distinguished *The Margaret* (1), saying that the collision there occurred at night and the anchor could not be seen, and held the badly navigated vessel alone to blame for the collision, because those on board of her might have seen the dangerous position of the anchor.

It is very difficult, except in the cases just mentioned, to think of any cases where there is strictly synchronous negligence. And if that be the rule the application of the doctrine of contributory negligence to collisions, whether

(1) (1881) 6 P. D. 76.

(2) [1893] P. 23.

on land or sea, would be rare. Still rarer would be cases where the more minute calculations required by the Maritime Conventions Act could find place.

In *Dowell* v. *General Steam Navigation Co.* (1) a collision between a sailing vessel which had taken in her light and a steamer, the questions put to the jury were :—

" First : 'Was there negligence on the part of the plaintiffs with respect to the light, which led to the collision ?'

Secondly : 'Could the defendants have avoided the collision by ordinary care and skill ?'

Thirdly : 'Was the damage occasioned by the accident the result of circumstances for which more blame attaches to the one side than the other ?' "

And the jury answered—

" First : 'We find there was fault on the part of the collier in not continuing the light till the danger was past.'

Secondly : 'It is the opinion of the jury that the steamer was going at too great a speed on so dark a night, in which respect there was want of caution : but that it was impossible to have avoided the accident when the steamer was within two or three of the collier's lengths.'

Thirdly : 'We are much inclined to think the preponderance of blame to be with the steamer.' "

On these answers the judge entered a verdict for the plaintiffs, giving the defendants leave to move.

But the Court set this aside and said that the answers of the jury to the questions put to them amounted, in point of law, to a verdict for the defendants.

In the course of his judgment, Lord Campbell, who delivered the judgment of the whole Court, himself, Coleridge, Erle and Crompton JJ. said (2) : " The jury appear to have come to the conclusion . . . . that the collier did shew a light . . . . but did not continue to shew it for a reasonable time; and that, while the danger still existed, and the light ought to have been shewn, the collier was in fault and broke the regulations by not continuing to shew it. We likewise think that the jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault the loss is equally divided: but in a Court of Common Law the plaintiff has no remedy if his negligence in any degree contributed to the accident. In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident; and in these cases the question arises, whether the defendant by the exercise of ordinary care and skill might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted Donkey case: *Davies* v. *Mann.* (1) There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject: and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he and he only proximately causing the loss. But in the present case the jury appear to have concluded . . . . that the negligence of the master of the collier, in not properly complying with the Admiralty regulation, directly contributed to the accident, although there was negligence on the other side, and 'the preponderance of blame' was 'with the steamer.'

---

(1) (1855) 5 E. & B. 195, 198.

(2) 5 E. & B. 205.

. . . .

We have further to consider whether the answer of the jury to the first question is at all neutralized or qualified by their answers to the second and third questions. On the contrary, by these the finding against the plaintiffs seems to be strengthened. To the second, the jury say that the steamer was going at too great a speed on so dark a night; in which respect there was want of caution; but that it was impossible to have avoided the accident when the steamer came within two or three collier's lengths. While the jury here impute blame to the steamer, they do not retract or vary anything they had before said about the non-observance of the Admiralty regulation by the collier: and the concluding part of the answer beginning with the word 'but' may be explained by the jury having believed . . . . that the collier was not seen by the steamer till within two or three ship's lengths, and that this arose from the fault of the collier in not continuing the light till the danger was past.

---

(1) (1842) 10 M. & W. 546.

The answer to the third question is unequivocally unfavourable to the plaintiffs. . . . ."

It was not necessary for the Court to determine whether both vessels were in fault or only the sailing vessel, but the whole trend of the judgment seems to me to point to the idea that both were in fault and that if it had been a case in Admiralty, the damages would have been divided.

The case has been cited at length, because it seems to be an instance of acts of negligence close together, but still in sequence.

For the purpose of considering the Admiralty doctrine of both to blame a mass of cases occurs where both ships had been held to blame in collisions before the passing of the Merchant Shipping Act of 1876, which may be put on one side. That Act provided that if a collision occurred and a ship was found to have broken one of the regulations for preventing collisions at sea she should be deemed to be in fault, and the Courts generally and this House in particular construed this as meaning that if the navigation could be shown to have contributed to the collision it was to be deemed contributory negligence. This, however, did not prevent the tribunals from determining where the real fault lay, and if they were of opinion that it lay with the other ship in holding both to blame.

This law prevailed from 1876 till it was repealed by the Maritime Conventions Act of 1911. During the period from 1876 to 1911 the only cases useful to consider are cases at sea where, owing to the peculiar circumstances, no regulations applied, or cases in rivers and inlets to which neither the regulations nor the statute applied.

By the Maritime Conventions Act, 1911, s. 1, it is enacted that:—

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels . . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

"Provided that—

"(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed."

Effect was given to this last provision in *The Peter Benoit.* (1)

In *The Westernland* (2) (cited in Marsden, 7th ed., p. 37), a schooner, contrary to regulations, brought up opposite a launching slip and refused to move. The launch attempted to get under way and fouled her, and both were held to blame. But, on the other hand, in this country, in *The Andalusian* (3) and *The George Roper* (4), the launch was held wholly in fault, and the American case probably goes too far.

The following are cases of negligence in sequence.

In *The Sans Pareil* (5), where a tug with a vessel in tow was crossing the line of a squadron of warships, the tug and tow were held in the Court of Appeal to blame for persisting in trying to cross the Fleet. But it having been admitted by the Attorney-General acting for the Queen's ship in the Court of first instance that there was negligence in the management of the *Sans Pareil* in acting for the tug only and not noticing the tow as she was crossing, the *Sans Pareil* was held alone to blame. But, as one of your Lordships pointed out in the course of the present argument, the admission by the Attorney-General, made in the way in which it was, might partly account for this decision.

---

(1) (1915) 13 Asp. M. L. C. 203.

(2) (1885) 24 Fed. Rep. 703.

(3) (1877) 2 P. D. 231.

(4) (1883) 8 P. D. 119; 5 Asp. M. L. C. 134.

(5) [1900] P. 267; 9 Asp. M. L. C. 59, 78.

In *The Hero* (1) the House of Lords, in a not dissimilar case, held that without applying the penal clause of the Merchant Shipping Act both vessels must be held in fault, the *Hero*, because, having improperly ported, she ran across the bows of three destroyers, and "in the ordinary plain common sense of this business the *Hero* not only contributed but mainly contributed to this accident." On the other hand, the King's ship was not held free from fault, because an order to port which had been given by the navigating officer and which would have saved the vessels from collision was countered by an order to starboard, given by the commander when he came on deck.

This case was decided by the Court of Appeal upon the breach of the statute by the merchant ship, but the point was made that the statute did not apply, and your Lordships in this House appear to have decided upon common law principles. It would seem that in chronological sequence there would have been no collision but for the negligence either of the navigating officer in not informing the commander that the helm was aport or of the commander in countering the port order. This, therefore, seems a case where the two acts of negligence were not synchronous but in sequence.

In *The Ovingdean Grange* (2), a collision in the Thames where the statute did not apply, Sir Francis Jeune and the Court of Appeal held that a steamship proceeding down the river against the tide, and having under the Thames rules to wait under the point till the up-coming steamer passed clear, was partly to blame, although the actual fault was in the up-coming steamer, for not keeping a proper lookout and for turning without a proper regard to the passing traffic. There again the negligence seems to have been in sequence.

In *Cork Steamship Co.* v. *Kiddle* (3), which was recently before your Lordships' House and is not reported in the regular reports, there was a division of opinion among your Lordships on this question. But it was finally held by the House that it was a case where the subsequent negligence was the only material one to be considered. In that case, which happened during the war, the King's ship *Active* committed a negligent act in proceeding out of Dover Harbour on a cross-Channel course, with lights necessarily shaded, at great speed, thereby bringing about risk of collision with vessels proceeding down Channel. But the *Ousel*, a vessel proceeding down Channel, could, as it was held, if she had had a proper lookout, have seen the red light of the *Active* in time. Your Lordships disregarded the prior negligence of the *Active* and treated the two vessels as being, at the material time, however they had got into the position, ships crossing so as to involve risk of collision. This being so, the *Ousel* became the give-way ship and ought to have ported; and for her failure to port and her bad lookout she was held alone to blame.

---

(1) [1912] A. C. 300.

(2) [1902] P. 208.

(3) 2 Lloyd's List Rep. 505.

In this connection the numerous cases of collision between two steamships, where A. is held to blame for bad lookout and wrong helm action, but B. also to blame for not stopping and reversing, must not be disregarded.

Some of them can be explained on the footing that A.'s action made the collision unavoidable, but B.'s speed increased the damage. This may well be if B. goes stem on into A. But if B. is hit in the side or flank it is frequently the case that it will not even be suggested that B.'s speed had any effect on the damage. If these cases be analysed in chronological sequence, either A.'s action made the collision unavoidable or brought about such a sudden peril that B.'s people had not time to think out properly what they should do and A. is alone to blame (such decisions have been given).

Or on the other hand, notwithstanding A.'s prior negligence it was the subsequent negligence of B. in not reducing speed which caused the collision and B. should be alone to blame. It would be difficult to find an instance of such a decision; but many decisions will be found of both to blame.

Mr. Marsden, writing before the Maritime Conventions Act passed, suggests as matters of contributory negligence acts or motions either concurrent in time or identical in character or equal in degree of fault. If this be correct, the acts of negligence need not be synchronous.

Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the Maritime Conventions Act with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

Your Lordships have now to apply these considerations of law to the facts of the present case.

As already stated, if the *Volute* had not neglected to give the appropriate whistle signal when she ported there would have been no collision. On the other hand, if the *Radstock* in the position of danger brought about by the action of the *Volute* had not gone full speed ahead, there would have been no collision.

The case seems to me to resemble somewhat closely that of *The Hero*. (1) In that case, as in this, notwithstanding the negligent navigation of the first ship, the collision could have been avoided if proper action had been taken by the second ship. Indeed, that case is remarkable, because the proper order was actually given, but unfortunately countermanded. In that case this House held both vessels to blame, apparently considering the acts of navigation on the two ships as forming parts of one transaction, and the second act of negligence as closely following upon and involved with the first. In the present case there does not seem to be a sufficient separation of time, place or circumstance between the negligent navigation of the *Radstock* and that of the *Volute* to make it right to treat the negligence on board the *Radstock* as the sole cause of the collision.

---

(1) [1912] A. C. 300.

The *Volute*, in the ordinary plain common sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision. And accordingly, I move your Lordships to reverse the order appealed from, and to pronounce the *Volute* partly to blame for the said collision, with the usual consequential directions. And I think that there should be no costs in the Courts below, but that the plaintiffs should have the costs of the appeal to your Lordships' House.

VISCOUNT FINLAY. My Lords, I concur, and I have nothing to add beyond this one sentence, that I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence.

LORD SHAW OF DUNFERMLINE. My Lords, I have had in considering this case much difficulty. In the end I have resolved my difficulties by adhering, as I now fully do, to the judgment which your Lordship (the Lord Chancellor) has just read. I would venture to concur with my noble and learned friend on my left (Viscount Finlay) as to the quality of that judgment.

LORD PHILLIMORE. My Lords, I concur.

VISCOUNT BIRKENHEAD L.C. Before putting the questions it is proper that I should acquaint your Lordships with the fact that my noble and learned friend, Viscount Cave, has signified to me his concurrence with the reasoning and conclusions of my judgment.

Order of the Court of Appeal reversed, and declared that the steamship Volute be pronounced partly to blame for the collision : the

H. L. (E.)
1921
ADMIRALTY COMMISSIONERS
v.
S.S. VOLUTE.

respondents to pay the costs of the appeal to this House: no costs to be allowed to either side in the Courts below: cause remitted to the Admiralty Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Dec. 15, 1921.

Solicitor for the appellants: *The Treasury Solicitor.*
Solicitors for the respondents: *Waltons & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1921
Dec. 13.

ANCHOR LINE (HENDERSON BROTHERS), LIMITED . . . . APPELLANTS;

AND

MOHAD . . . . RESPONDENT.

Workmen's Compensation—Seaman—Liability of Shipowner for Expenses of Maintenance under Merchant Shipping Acts—Date of Commencement of Compensation—Merchant Shipping Act, 1906 (6 *Edw.* 7, *c.* 48), *s.* 34, *sub-s.* 1—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*).

By the Merchant Shipping Act, 1906, s. 34, sub-s. 1, if a seaman receives any hurt or injury in the service of the ship, the expenses of his maintenance until he is cured, or dies, or is returned to a proper return port, and of his conveyance to the port, shall be defrayed by the owner of the ship.

Sect. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, applies the Act to seamen, subject to (inter alia) the following qualification: "(*e*) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, ... liable to defray the expenses of maintenance of the injured . . . . seaman."

In June, 1920, a Mohammedan seaman, who was engaged for service throughout a round voyage from Bombay to the United Kingdom and back to Bombay within one year, sustained in the course of the voyage an injury arising out of his employment, whereby he was for a time totally incapacitated and remained partially incapacitated. He was treated in hospital at Marseilles and was ultimately taken to Glasgow where he rejoined his ship. In September, 1920, while the shipowners were in process of returning the seaman to Bombay, he left the ship without leave and deserted his service:—

---

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

H. L. (Sc.)
1921
Anchor Line (Henderson Bros.), Ld. v. Mohad.

Held (by Viscount Haldane, Viscount Finlay, Lord Dunedin, and Lord Shaw of Dunfermline; Lord Sumner dissenting), that the liability of the owners in respect of the maintenance of the seaman under the Merchant Shipping Act, 1906, ceased from the date of his desertion, and that he was entitled to an immediate payment of compensation.

Decision of the Second Division of the Court of Session in Scotland affirmed.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland recalling a determination of the Sheriff-Substitute of Lanarkshire under the Workmen's Compensation Act, 1906.

The facts found by the arbitrator were as follows:—

On June 14, 1920, the respondent, a Mohammedan seaman, sustained an injury to his right hand by accident arising out of and in the course of his employment as a greaser with the appellants on their steamship *Circassia*. As the result of this injury the respondent was for some time totally, and was at the date of proof still partially, incapacitated for work. The respondent's contract with the appellants was "for service throughout a round voyage from Bombay to the United Kingdom and back to Bombay within one year." After the accident the respondent was treated in hospital at Marseilles and then brought by the appellants in one of their steamers to Liverpool, and thence by train to Glasgow "where he rejoined the s.s. *Circassia*." In September, 1920, while the appellants "were in process of returning the respondent to the Port of Bombay in terms of their contract and of the provisions of the Merchant Shipping Act, 1906, he left the said s.s. *Circassia* without leave, and deserted his service." The appellants had all along been willing and now offered to return the respondent to the Port of Bombay.

The sheriff-substitute found in law (1.) that the appellants were liable under the provisions of the Workmen's Compensation Act, 1906, to pay compensation to the respondent during his incapacity resulting from the said injury, and

(2.) that, the appellants being liable under their contract with the respondent and under the provisions of s. 34 of the Merchant Shipping Act, 1906, to defray the expenses of the maintenance of the respondent until he should be returned to Bombay, no weekly payment was at the date of his award payable. He therefore issued an award refusing in hoc statu to award compensation. The question of law for the opinion of the Court was: On the facts as stated and in view of the provisions of the Merchant Shipping Act, 1906, s. 34, and the Workmen's Compensation Act, 1906, s. 7, sub-s. 1 (*e*), was the arbitrator entitled to refuse an award of compensation.

The Second Division (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Ormidale) answered this question in the negative and remitted the case to the arbitrator to award compensation.

1921. Dec. 12, 13. *Alexander Moncrieff K.C.* (of the Scottish Bar) and *Bernard Sandeman* (of the English Bar) for the appellants. Under s. 34, sub-s. 1, of the Merchant Shipping Act, 1906, the appellants were bound to defray the expenses of the respondent's maintenance until he was returned to the Port of Bombay and of his conveyance to that port, and by s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906, compensation was not to be payable under that Act in respect of the period during which the owner of the ship was liable to defray the expenses of maintenance of the injured seaman. That period has not come to an end in this case. The appellants being willing to return the respondent to the Port of Bombay and to bear the expense of his maintenance and conveyance until such return is effected, the respondent cannot by his own wrongful act of desertion anticipate the date at which compensation under the Workmen's Compensation Act, 1906, becomes payable. The appellants had an interest to require the respondent's return to Bombay where he would be among his own people and have a better chance of obtaining such employment as his diminished capacity might restrict him to.

H. L. (Sc.)
1921
ANCHOR LINE (HENDERSON BROS.), LD. v. MOHAD.

[They cited *Ashrody* v. *S.S. City of Edinburgh* (1) and *Turner* v. *S.S. Haulwen.* (2)]

Morrice Mackay K.C. (with him *Craigie M. Aitchison* and *A. H. W. Gillies*) (all of the Scottish Bar) for the respondent. The liability referred to in s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906, means de facto liability, and any act of the seaman which provides a good defence to the owner to the claim for maintenance is sufficient. There is here desertion, or, alternatively, a refusal to be repatriated, and the liability of the owners under the Merchant Shipping Acts came to an end by reason of the action of the seaman. Thereupon the respondent became entitled to be paid compensation under the Workmen's Compensation Act. The object of the two provisions was simply to prevent overlapping payments: *McDermott* v. *S.S. Tintoretto.* (3)

Alexander Moncrieff K.C. replied.

VISCOUNT HALDANE. My Lords, the point in this appeal is a very short one, and it turns, in the view which I shall venture to submit to your Lordships, on the construction of two sections in the Merchant Shipping Act, 1906, and the Workmen's Compensation Act of the same year.

The way in which the question arose was this. It was a question tried under the Workmen's Compensation Act, the arbitrator being the sheriff-substitute of Lanarkshire, and he has made a statement of his findings in the usual form, a statement which is somewhat meagre but which raises the point.

The respondent, who was a Mohammedan seaman, was engaged by the appellants, apparently at Bombay, for a round voyage from that city to the United Kingdom and back to Bombay within a year, and in the course of the voyage he met with an accident to his right hand which appears to have been of a somewhat severe character. After the accident the respondent was treated in hospital at Marseilles, where the steamer appears to have stopped, and

---

(1) [1920] 1 K. B. 301, 311.
(2) (1915) 8 B. W. C. C. 242, 245.
(3) [1909] 2 K. B. 704, 714; [1911] A. C. 35.

H. L. (Sc.)
1921
ANCHOR LINE (HENDERSON BROS.), LD.
v.
MOHAD.
Viscount Haldane.

then he was brought, after treatment, by the appellants, in one of their steamers to Liverpool and thence by train to Glasgow, where he rejoined his steamer, the *Circassia*. Just after this, in September, 1920, he quitted the *Circassia* without leave and deserted the service.

Now these are the facts as found, and on these facts the arbitrator raises this question which went to the Second Division: "On the facts as stated and in view of the provisions of the Merchant Shipping Act, 1906, s. 34, and the Workmen's Compensation Act, 1906, s. 7, sub-s. 1 (*e*), was I, as arbitrator, entitled to refuse an award of compensation?" The view he took was this, that the two statutes must be read together, and that the right given by the Workmen's Compensation Act was a right which could not be put into operation because of a provision as to liability in the other Act to which I will in a moment call your Lordships' attention. The provision in the Merchant Shipping Act is the one which comes first in the order of date; the two Acts were passed in the same year; but the Merchant Shipping Act was passed, I think, first. It is s. 34, sub-s. 1: "If the master of, or a seaman belonging to, a ship receives any hurt or injury in the service of the ship, or suffers from any illness" (with certain exceptions), "the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master or seaman until he is cured, or dies, or is returned to a proper return port, and of his conveyance to the port, and in the case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages." That is a right given to the seaman in the present case. The Workmen's Compensation Act, s. 7, sub-s. 1 (*e*), says this: "The weekly payment" (that is in the case of compensation being recovered under the Workmen's Compensation Act) "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." Now the real question seems to me on those sections to be whether there was liability under the Merchant Shipping Acts to defray the expenses of maintenance.

The case, as I have said, went to the Second Division, and in the Second Division their Lordships answered the question adversely to the shipowner, adopting the construction that this was a case in which there was a right to an operative award of compensation immediately. They held that there was under the circumstances a supersession of the right which was given by the Merchant Shipping Act, because of the desertion of the seaman and his repudiation of the right given by the Merchant Shipping Act for his own benefit. The Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Ormidale took that view, and in the result they sent back the case to the arbitrator to proceed in the awarding of compensation at once under the Workmen's Compensation Act taking all circumstances into account and following the usual procedure. They evidently thought that what the sheriff-substitute ought to do was to award compensation and determine its amount, all the circumstances relating to benefits actually received under the Merchant Shipping Acts being taken into account.

My Lords, turning back for a moment to the Workmen's Compensation Act, the words are that the weekly payment is not to be payable "in respect of the period during which the owner of the ship is . . . . liable to defray the expenses of maintenance." Now the seaman deserted, and thereby he abandoned his right to claim under the section of the Merchant Shipping Act, and consequently there was no liability on the part of the shipowner. That is the interpretation I put on the two sections. If I am right, then the view taken in the Second Division was the true one.

For these reasons I move your Lordships that the judgment of the Court below be affirmed and the appeal dismissed with costs.

VISCOUNT FINLAY. My Lords, I am of the same opinion. I concur in the judgments delivered in the Second Division of the Court of Session. If I may respectfully say so, I think there is a fallacy in the judgment of the sheriff-substitute, and that is this, that he regards the provisions of s. 34 of the Merchant Shipping Act of 1906 as being to prolong the contract of employment. What he says is this: "Under the contract both parties were bound for the period of a voyage from Bombay to the United Kingdom and back to Bombay, and it appears to me that the effect of s. 34 of the Merchant Shipping Act, 1906" (that is the section which provides for the expenses of medical attendance in case of injury or illness), "is to prevent an earlier termination of the contract through the inability of the workman to continue in the performance of the duties of his service. The defenders, under the contract and the provision of the statute, are under an obligation to maintain the pursuer till they return him to Bombay, and the pursuer is under a reciprocal obligation to remain on the ship and perform the duties of his employment if, and when, and to the extent, he is able. The defenders may have, and I expect do have, an interest to require the pursuer to return to Bombay, where he will be among his own people and have the best chance of obtaining such employment as his diminished capacity must in future restrict him to. In my opinion, the pursuer is not entitled to desert his employment and have his rights under the Workmen's Compensation Act determined in advance." That judgment proceeds on the assumption that the contract of employment was continued by virtue of the section in question, and that the case turns on the point whether he can take advantage of his own breach of contract by deserting his service in the ship. It appears to me that the effect of this section is not at all what the learned sheriff-substitute has said. The effect of the provisions of the Merchant Shipping Act is to engraft on the contract of service certain statutory provisions for the benefit of the sailor. It does not prolong the contract of service. The provisions made by the Merchant Shipping Act for the benefit of the sailor are absolutely independent of the question whether the contract of service continues or whether it does not. It may continue or it may not continue, but the statutory provisions for the benefit of the sailor do not in the least imply that it does continue, and they do not depend upon its continuance. That seems to me to be the view that underlies the decision of the sheriff-substitute in which he treats the case as resolving itself into the question whether the sailor can take advantage of his own wrong in breaking the contract of service and deserting his employment. The question seems to me not to be of that sort at all. The question is whether the sailor is entitled to say, "I do not want the benefits which are conferred upon me by the Merchant Shipping Act. I prefer to go at once for the benefits of the Workmen's Compensation Act." In plain words it comes to this, whether the owners are entitled to say that the man must be repatriated to get compensation, and whether the owners have the right to say that the provisions of the Merchant Shipping Act, which seem to me to be intended in favour of the workman, must be carried out for their benefit. I do not stop to inquire, it would be mere speculation, what the reason of the owners may be. The sheriff-substitute suggests that it may be, because there would be more chance of the man's getting employment in Bombay among his own people, so that the workman's compensation would be reduced. It may possibly be that or it may be some other reason, but to seek for the reasons is to enter into the field of speculation. What we have to do is simply to determine what is the effect of the statutes.

Now, my Lords, it appears to me that it is not a question of a part of the contract of service; there is no clause in the contract of service to affect the section of the Merchant Shipping Act for the benefit of the sailor; it is a mere statutory right given to the sailor for his benefit in the events which are contemplated by these sections, and, of course, it is obviously in the highest degree desirable that there should be such provision, for very cruel cases indeed might arise if a sailor were left in a foreign port. Under these circumstances, my Lords, I am of opinion that there was no consent of the owner wanted to a renunciation by the sailor of the benefits conferred upon him. It is not in the least material whether he deserted or whether he did not; what he did unequivocally desire was not to be taken back to Bombay. The owner's case is that he is entitled to require him to go back to Bombay, not in the sense that he could have him arrested and put on board and taken back, but that unless he goes back to Bombay he could not get the benefit of the workmen's compensation. I cannot find that anywhere in the provisions to which we have been referred. After all the question comes back to be that of the construction of s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906. [His Lordship read the clause.] The reading contended for by the appellants is that that denotes the period during which liability under the Merchant Shipping Act might exist. I think it denotes the period during which liability actually exists, and if the workman has done something which will afford a complete defence to any claim by the workman against the owner under the provisions of the Merchant Shipping Act for repatriation, maintenance, and all the rest of it, there is an end of the liability under the Merchant Shipping Act in respect of these provisions; the owner is no longer liable, and what the heading to sub-s. 1 of s. 7 of the Workmen's Compensation Act, 1906, means is that so long as the owner of the ship is, in fact, on the facts of the case, liable under that section, the provisions of the Workmen's Compensation Act shall not come into play. As was said by several members of your Lordships' House in *McDermott* v. *S.S. Tintoretto* (1), I think the object is to prevent the overlapping of benefits, and it appears to me that it would be a very strange reading of the section to say that you are to take some period during which the right to the benefits under the Merchant Shipping Act would continue if the sailor had not renounced them. Inasmuch as the sailor has most effectually renounced them and there is no possibility of the owner's being made liable under the Merchant Shipping Act, I think all question of overlapping is out of the question, and on the plain meaning of the Act the defence fails.

(1) [1911] A. C. 35.

H. L. (Sc.)
1921
ANCHOR LINE (HENDERSON BROS.), LD. *v.* MOHAD.

LORD DUNEDIN. My Lords, I have found this case one of considerable difficulty, but in the end I have come to be of the same opinion as those of your Lordships who have already addressed the House.

The effect of the seventh section of the Workmen's Compensation Act, 1906, is to apply the Act to seamen, and the immediate effect of that is that, if there is an accident, a seaman, like other workmen, will be entitled to compensation in terms of the First Schedule, and the terms of the First Schedule provide for a weekly payment in respect of a "total or partial incapacity." But then s. 7, while it applies the Act, does so under certain modifications, and one modification is that under s. 7, sub-s. 1 (*e*), there is cut out from the payments that the seaman would naturally receive all payments during a certain period, and that period is thus defined : [His Lordship read the clause.] Now the whole point, I think, is whether that expression in the Act, "liable," refers to the period under which there may be what I may call potential liability under the terms of the Merchant Shipping Act, or whether it means the period during which under the exact circumstances of the case there is de facto liability. I have come to be of opinion that the more natural way of taking the two Acts together is to take the latter reading.

My great difficulty has arisen from this, that undoubtedly that does allow a person to take advantage of his own default, in this sense, that he may default in order to get the more ample provision under Act 2 than he would have got under Act 1. If the Act gives it him, it may be bad policy, but still he gets it. I say that because Mr. Mackay made an effort to show that here such benefits as the seaman was entitled to get were benefits outside the contract and after the termination of the contract. I do not go on that at all, because I do not think we have got in this case sufficient facts found to know whether this particular man's contract of service had been terminated or not. That the man's contract could be terminated by being landed at a foreign port I have no doubt. I have equally little doubt that it could not be terminated if he were landed only a few hours, even though a certificate were given. Therefore I have gone, I think, upon the natural meaning of the finding of the sheriff-substitute when he speaks of his deserting his service. Notwithstanding that, I think, taking the two Acts of Parliament as they stand, they lead to the result to which I have eventually come, and I therefore also agree that the appeal should be dismissed.

Lord Shaw of Dunfermline. My Lords, I agree. When seamen were given the benefits of the Workmen's Compensation Act it was necessary, of course, to provide that there should be, if possible, no clash with the already existing beneficial provisions applicable to seamen under the Merchant Shipping Acts.

In the case of *McDermott* (1) in this House we found that the principle to be applied was, not to refuse the benefits under either Act, except in the sense that there should be no conflicting or overlapping provisions, but that, subject to that, the beneficial provisions of both sections should be applicable.

My Lords, in the present case I confess that I have two difficulties on the matter of the statement of the case. I do not know to this hour—nor does any one of your Lordships—when this contract was made; accordingly none of us know when the period of twelve months from the making of the contract would have expired. In the second place, I do not know, nor has this House been informed, when this round voyage on which this seaman was employed came to an end. I am slow to accept the view that a voyage which began anterior to June—one of the incidents of which was the accident to this workman in the month of June, 1920—was the same round voyage which was only in course of completion in the subsequent month of September. The vessel was then in Glasgow, and presumably would reach Bombay in—shall we say?—six or eight weeks' time thereafter. That is not in accordance with the usual despatch of vessels of that class; but it may be so. Your Lordships will observe the

(1) [1911] A. C. 35.

difficulty in which everybody is placed by the lack of the knowledge definitely of that fact. For if the round voyage had been definitely concluded, then it appears to me humbly that this seaman's contract was at an end. It was not a contract for a period of twelve months' service to these owners; it was a contract for one round voyage—not a contract of service for portions of a round voyage which counted up together would make one, but not a continuous, round voyage.

My Lords, fortunately the absence of knowledge of these facts does not, on further consideration, prevent us from settling how the law of this case stands. I agree with the noble and learned Viscount on my left that the view taken by the learned sheriff-substitute, which he embodies in a phrase in his note, as to the obligations on the part of this seaman to remain and perform his duty, cannot be applied to this case. The seaman was an injured man. It seems out of the question to suggest that there were "reciprocal" obligations in September (when he came back injured and unable to perform, as the learned sheriff-substitute finds, anything other than exceptional duties), that he was to continue as an A.B. seaman in the service of these employers.

My Lords, the whole matter appears to me to be settled, as my noble and learned friend, Lord Dunedin, has said, by the construction of the simple word "liable" in s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act of 1906. What happened was this. In June the workman sustained his accident; he was put ashore in Marseilles; he remained in hospital for some weeks there, and afterwards he arrived in Glasgow, under very proper arrangements, I am certain, made by the owners of the *Circassia*. He went on board the ship which was about to sail for Bombay, and he then left the ship. If the learned sheriff-substitute is of opinion that that was a continuing service, he would on that view be justified in using the word "deserting"; but whether the seaman deserted the ship, or whether he left it as of right, matters nothing in the construction of this section, because

Lord Shaw of Dunfermline.

I am clearly of opinion that when the owners made this seaman the offer to convey him from Glasgow to Bombay to his own home port, and when the seaman declined to accept that offer, the obligation of the owners was completely at an end, and it is mere finesse to argue that they still remained liable to perform that obligation.

There is no such liability—it is at an end. And if there be no such liability, I have to construe now these words: "The weekly payment" (such a payment as is asked in this case) "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." There is no such liability; there are no such expenses to pay; they have been all paid except the return journey, and the return journey is not asked. It is a mere conjectural or imaginative liability that is set up, and I cannot construe the statute in any sense other than that it applies to the actual fact of liability not to an imaginative situation.

For these reasons, my Lords, I concur.

LORD SUMNER. My Lords, it is my misfortune to think that the judgment of the Second Division was wrong; it is my much greater misfortune to be unable to agree with the opinions of your Lordships. With all humility, but without any doubt, I will ask your Lordships to bear with me for a few minutes while I say why.

There is no sounder principle in workmen's compensation cases than to abide literally and loyally by the findings of the arbitrator, and to my mind it is perfectly clear that the arbitrator in this case found as a fact, that the seaman in question was still in the service of the appellants at the time when he deserted. He says that after the man had been treated in hospital at Marseilles, and brought by one of the appellants' steamers to Liverpool and thence by train to Glasgow, he "rejoined" the *Circassia*, and that, while there and while the appellants were in process of returning him to the port of Bombay in terms of their contract (that is their contract of employment) and of the provisions of the Merchant Shipping Act, 1906, "he left the said s.s. *Circassia* without leave, and deserted his service." Those terms are perfectly appropriate to describing the conduct of a seaman who, after a temporary absence in hospital, resumed his service on his former ship, did not like it, absented himself without leave, and committed the offence of desertion; they are absolutely inappropriate to describe what has been suggested at the Bar, that is to say, the position of a person, whose contract of employment has terminated, who has been brought, without any great amount of acquiescence on his part, back to his ship and has been invited to proceed in her as a passenger to Bombay, and has then said that he does not like it and would prefer to remain even in Glasgow.

I wish to remind your Lordships that, if he deserted, as it is found that he did, he was not only liable for an offence punishable by summary conviction, but under s. 222 of the Merchant Shipping Act, 1894, the master and owners were entitled to the services of the police, and were also entitled to use their own force, in order to bring the man back to his ship and make him resume his service and proceed with the ship to sea. The sheriff-substitute misused language strangely in saying that this man had "deserted," that is to say, had committed an offence of that kind, if all that he had really done was to decline to take his passage in the ship that was tendered to him. It was also plainly assumed in the Court below that his service continued, and that he was deserting in the true sense of the word; and the point argued and decided there was whether, in spite of his having broken his contract of service and not having brought it to an end, he could claim at his own hand to apply s. 7, sub-s. 1 (*e*), of the Workmen's Compensation Act, 1906, to his own advantage, even though it conflicted with the corresponding section of the Merchant Shipping Act, 1906.

Probably the most important thing is to look at these two sections together. It is to be borne in mind that the two Acts of 1906 received the Royal Assent at the same time and on the same day; and that one was complementary to the other. The Workmen's Compensation Act, 1906, provided for the terms, on which seamen should be brought within the benefit of workmen's compensation; the Merchant Shipping Act, 1906, provided, among other things, for limitations upon that benefit, which arose out of the special treatment systematically extended to seamen under all the Merchant Shipping Acts. Now here is a man, whose service has not been brought to an end in the manner provided by the Merchant Shipping Acts with the formalities strictly prescribed under them. He has never received his discharge; he was not in fact left at Marseilles under circumstances that terminated his employment, or, at any rate, it is not so found; and on the contrary it is found in my view that he was still in the employment of the ship. Under these circumstances he has sustained an accident. Now the weekly payment which in respect of that accident may be payable "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice." Considering that those two pieces of legislation are absolutely coterminous, it seems to me that the natural construction is to treat the reference to the Merchant Shipping Act, as amended, as being a short way of inserting in the Workmen's Compensation Act, 1906, the relevant provision, namely, s. 34, sub-s. 1, of the Merchant Shipping Act, 1906; for I will assume (as it has been assumed throughout) that it is s. 34, sub-s. 1, and not s. 34, sub-s. 2, which governs this case. I think the natural mode of reading that is to say, that the weekly payment shall not be payable in respect of the period, during which the owner of a ship under the Merchant Shipping Act, whenever a seaman receives any hurt or injury in the service of the ship, is liable to defray the expense of attendance and medicine, and the expenses of maintenance, until he has returned to a proper return port, without any deduction on that account from his wages. Although in the case of *McDermott* (1) your Lordships' House was dealing with another question, I would quote the language of Lord Loreburn as expressing what I take to be the construction of these two sections read together: "Before 1906 the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends." On that ground I think that this question does not depend upon what, in particular circumstances, a seaman might be able to sue for, or what might constitute a defence to a shipowner, if he chose to set it up, when sued. The reference to the Merchant Shipping Act is a mode of reading the two sections together. In view of the fact that the man was still in the service of the ship, in view of the fact that being in the service of the ship he was bound to render such service as he could in return for his wages, in view of the fact that the finding is that he was partially incapacitated, and, as anybody can tell who knows the sea, there are many things he might have been employed to do, I think it is plain that, on the one hand, the owner was bound to pay wages and to defray all these various expenses, but, on the other hand, the seaman was bound to render services suitable to his state and capacity so far as he could. That being so, the Workmen's Compensation Act period had not begun, because the Merchant Shipping Act period had not terminated.

Suppose that the right way to look at it is, as your Lordships are minded to do, and to say that the word "liable" means liable in the particular circumstances of the case. I regret to see—doubtless it must be by inadvertence—that in more than one passage in the judgments in the Court below it has been assumed, that it is possible for a seaman, by breaking his contract and deserting his service, to bring the contract to an end, at his own hand, either in whole or in part. I do not understand it to have been contended before your Lordships that that doctrine is really true. I understand

(1) [1911] A. C. 35, 39.

the two propositions presented here to be, first of all, that the benefit (whether it arose under the contract or arose under the statute, the contract having terminated) was a benefit of a unilateral character which the seaman could waive at any time that he chose, or secondly that the word "liable" in the Workmen's Compensation Act may have the effect of meaning, that in this particular case the statute enacted that one party to a contract can at his own hand terminate reciprocal obligations in that contract without the assent of the other party. I cannot believe that such an invasion of the law of contract was intended by the Workmen's Compensation Act, 1906; and, as to the other point, I think it is quite clear that, under the circumstances, the benefit of maintenance did not constitute a purely unilateral advantage, which it was simply competent to the seaman to waive. Under the contract, as regulated by this statute, the shipowner has an interest in his obligation to maintain the seaman—that is one way of putting it—or he has a right dependent upon the continuance of the period of maintenance, which is of advantage to him—namely, to postpone in his own favour the commencement of the Workmen's Compensation Act period until the termination of the Merchant Shipping Act period. To say that, by deserting, the workman got rid of any obligation as to his maintenance, for he discharged it, is to overlook the consideration that the existence of that obligation was a thing beneficial to the shipowner, and, being a thing which arose out of the contract, could only be discharged either by mutual consent, which was not given, or by a repudiation of the obligations of the contract on the one hand, assented to expressly or by implication, on the other. Neither of these things is found to have occurred. Surely it is not a fair statement of the argument for the appellant to say, as I think the learned judges below did say, that the shipowner claims the right to repatriate a seaman, or to declare that his return to Bombay is a condition precedent to any obligation on his part under the Workmen's Compensation Act. To say that a workman, by refusing to proceed and be maintained on the voyage, and to perform such services for his wages as he is fit to perform and to receive his ultimate discharge in due statutory manner when he is returned to Bombay and, further, by committing the crime of desertion, entitles himself, for his own advantage and the disadvantage of the shipowner, to bring the Workmen's Compensation Act into operation earlier than would otherwise be the case, is to deprive the shipowner of his rights under the contract—namely, to hold the man to his engagement, to require that, being only partially incapacitated, he shall render any services that he can of a seamanlike character, and, above all, to maintain in force the obligations of the contract and of the Merchant Shipping Act, 1906, so as to postpone the application of the Workmen's Compensation Act. It appears to me to be quite clear that, even if you read the words "liable to defray" as meaning "liable under the particular circumstances to defray," or "*de facto* liable to defray," or "possessed of no defence that he could plead to an action for not defraying"—even if you read the words in that sense—you cannot do so without affirming that this contract has, by this harmless looking sub-section, been made different from all other contracts, and is a contract, which one party can break and thereupon dissolve to his own advantage without the consent of the other party. That, as I have already said, I do not think the statute provides. I, therefore, should have thought that the appeal should have been allowed.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 13, 1921.

Agents for the appellants: *John Kennedy & Co., W.S., for J. W. Macalister & Dundas, Glasgow, and Macpherson & Mackay, W.S., Edinburgh.*

Agent for the respondent: *D. Graham Pole, for W. G. Leechman & Co., Glasgow and Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) * COSTELLO . . . . APPELLANT;

1922

Jan. 20.

AND

ROBERT ADDIE AND SONS' COLLIERIES, LIMITED . . . . . . RESPONDENTS.

Workmen's Compensation—Accident arising out of Employment—Miner—Shot Firing—Misfire—Breach of Statutory Regulation—Explosives in Coal Mines Order of September 1, 1913, *para.* 3 (*a*)—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A shot misses fire within the meaning of para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, if a naked light is applied to the fuse and the shot does not explode at the usual time, and the regulation applies where the man who applies the light to the fuse bona fide believes that he has not succeeded in igniting it. If therefore he approaches the shot-hole within the prohibited time, and the shot explodes and injures him, he commits a breach of the regulation and the injury does not arise out of his employment.

Waddell v. *Coltness Iron Co.* (1912) 50 S. L. R. 29; *Smith* v. *Archibald Russell, Ld.* (1921) 58 S. L. R. 284; and *Fife Coal Co.* v. *Sharp* [1921] 1 A. C. 329 applied.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland reversing a determination of the Sheriff-Substitute of Lanarkshire under the Workmen's Compensation Act, 1906.

The facts found by the sheriff-substitute were as follows: The appellant, a miner, was injured on December 6, 1917, by accident in No. 3 pit, Rosehall Colliery, Whifflet, belonging to the respondents, while he was employed by them there. The appellant and his mate, Alexander Fisher, in the course of and as part of their employment, had to prepare and fire two shots in the pavement. The appellant prepared one and his mate the other, each with a detonator and with a fuse attached. The shots were from 2½ ft. to 3 ft. apart. The men then applied a light to the fuses. Fisher was successful in lighting his. Both the appellant and Fisher were of opinion that the appellant was unsuccessful in lighting his. As, however, Fisher's fuse was burning it was necessary for them to seek a place of safety. This they did. They heard Fisher's shot go off, and waited for between thirty and forty minutes to allow the "reek" to clear and to eat their "pieces" and have a smoke. Between thirty and forty minutes after they had left the place where the shots were, the appellant returned to light his own shot. This shot, the fuse of which he believed he had not lit, went off as he was in the act of approaching it and injured his left leg and foot. The appellant suffered serious and permanent disablement as the result of the injury he had sustained.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

Para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, applied to this pit and provided that: "If a shot misses fire the person firing the shot shall not approach or allow any one to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

The shot in question was a shot "fired by other means" —by the application of a naked light to the fuse.

The sheriff-substitute found that the accident arose out of and in the course of the appellant's employment, and he awarded compensation. The Second Division (the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen), on the authority of *Smith* v. *Archibald Russell, Ld.* (1), reversed the determination of the sheriff-substitute.

1921. Dec. 12. *C. D. Murray S.-G.* for Scotland (with him *J. C. Fenton* (of the Scottish Bar) and *Brightman* (of the English Bar)) for the appellant. The finding of the arbitrator that the appellant did not in fact ignite the fuse attached to his shot distinguishes this case from *Waddell* v.

(1) 58 S. L. R. 284; 1921 1 S. L. T. 171.

Coltness Iron Co. (1), and *Smith* v. *Archibald Russell, Ld.* (2) upon which the Second Division relied. Moreover *Waddell's Case* (1) was decided under a different rule. But unless those cases are distinguishable it is submitted that they were wrongly decided. A shot does not miss fire within the meaning of para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, if, as may be inferred from this case, it was fired by means of an outside agency, such as a spark from a neighbouring fuse. Therefore the appellant committed no breach of the regulation and he is entitled to compensation.

[He also referred to *A. G. Moore & Co.* v. *Donnelly and Fife Coal Co.* v. *Sharp.* (3)]

Condie Sandeman K.C. (of the Scottish Bar) and *Harold Beveridge* (of the English Bar) for the respondents were not called on.

The House took time for consideration.

1922. Jan. 20. Viscount Haldane. My Lords, in this case I have had the opportunity of perusing the judgment which has been prepared by my noble and learned friend, Lord Dunedin. That judgment entirely expresses my own view and I desire to adopt it. My noble and learned friend Lord Sumner has requested me to say that he takes the same attitude.

Viscount Finlay. I also concur in the judgment which has been prepared by my noble and learned friend, Dunedin, and I have nothing to add to it.

Lord Dunedin. My Lords, in this appeal I take the narrative of the essential facts of the case from the case which was stated by the arbiter, the sheriff-substitute, in a workman's compensation case for the opinion of the Court of Session. [His Lordship quoted the facts from the case

(1) 50 S. L. R. 29; 1912 2 S. L. T. 301.

(2) 58 S. L. R. 284; 1921 1 S. L. T. 171.

(3) [1921] 1 A. C. 329.

and continued :] The sheriff-substitute found that the accident arose in the course of and out of the appellant's employment and awarded compensation accordingly. The Second Division, on appeal, reversed the judgment of the arbiter and remitted to him to dismiss the claim. They proceeded on the authority of the case of *Smith* v. *Archibald Russell, Ld.* (1), which had been decided by the First Division a week before ; and two of the learned judges confined their remarks to the statement that the case was ruled by that decision. Lord Salvesen said that apart from authority he would reach the same conclusion.

There is no question but that the appellant was in the course of his employment. The question as to whether the accident arose out of his employment or not depends entirely on whether he did or did not act in contravention of a statutory rule. In the case of *Plumb* v. *Cobden Flour Mills Co.* (2) in your Lordships' House, it was pointed out that prohibitions were of two classes ; those that do, and those that do not limit the scope of the employment. The case of *Fife Coal Co.* v. *Sharp* (3), in your Lordships' House, settled that a prohibition of the first class was effected by the rule contained in para. 3 (*a*), Explosives in Coal Mines Order, September 1, 1913, which applied to the pit in question, and was as follows : "If a shot misses fire, the person firing the shot shall not approach or allow any one to approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

The argument of the appellant in this case turned entirely on the contention that in order to have a miss-fire in the sense of the Order, you must first have ignition, and that here there was a finding that ignition had not taken place. In the case of *Waddell* v. *Coltness Iron Co.* (4), in the Court of Session, under a rule of prohibition phrased, "if a shot has

(1) 58 S. L. R. 284; 1921 1 S. L. T. 171.

(2) [1914] A. C. 62.

(3) [1921] 1 A. C. 329.

(4) 1912 2 S. L. T. 301.

been fired and does not explode," I, sitting as Lord President, decided that to light, under the rule, meant to apply a light with a view to ignition and did not infer a certioration that ignition had effectively taken place. The case of *Smith* v. *Archibald Russell, Ld.* (1), which was followed by the Second Division in this case, was in the First Division. In that case, as here, there were two shots contiguous to each other prepared by the men who simultaneously applied a light to the strum or fuse. The finding of the arbiter was : " The appellant applied his naked light to the end of the strum of his shot but he believed that the strum had not been ignited. As, however, Mickelham (who was the other man) had lit his he told the appellant it was time to retire." I summarise what followed. They did retire, but, the appellant returning within the forbidden time, his shot went off and he was injured. The Court held that the accident did not arise out of his employment. The Lord President Clyde, who delivered the judgment of the Court, after reading para. 2 (*e*) of the Order which provides that—" The person firing the shot shall take shelter "—and also para. 3 (*a*) already cited, says as follows : " A shot misses fire in the sense of the latter paragraph if it does not explode in the usual time. Firing the shot is the equivalent to igniting the fuse by applying a naked light, in the language of the Order. But what does the latter expression imply ? I think it means such application of the naked light to the fuse as in ordinary circumstances will cause the fuse to take light. If that is not its true meaning, the whole of the provisions of the Order on this topic become useless. For the ordinary interval between the ignition of the fuse and the explosion is short, and the Order would fail in its object if it permitted the workman to go on applying the naked light to the fuse until he was satisfied that he had successfully ignited it." And he then proceeds to say that he thinks it is in accordance with what I said in *Waddell's Case.*

My Lords, I agree with the Lord President. I would only submit a remark by way of further observation. No man presumably is anxious to go and get blown up. It is only therefore in cases where he thinks that he has not successfully ignited the fuse that he returns to it at all. It is just to protect him against himself that the regulation says he shall not go back till after such an interval as will reasonably avoid the danger of a deferred explosion. Yet if the opposite argument is right, then this is a class of case to which the regulation cannot apply.

---

(1) 58 S. L. R. 284, 286 ; 1921 1 S. L. T. 171.

My Lords, this would be my opinion if there were no further authority, but there is further authority to which I think it a pity that your Lordships' attention was not specially directed at the debate; though probably it is due to the fact that the case to be mentioned is reported embedded between two others. In the case of *Fife Coal Co.* v. *Sharp* (1), in your Lordships' House, already cited, the regulation said to be transgressed was the same as in this case. The facts were also the same in respect that two contiguous shots were laid by two different men, that both men attempted to light the fuse, and that on retirement only one shot went off, though on premature return the other shot exploded. I have looked at the appeal case of that case and I find that one finding of the arbiter was as follows: "Each of the men then took his lamp from his cap for the purpose of applying a light to the end of his strum in order to fire his shot. Thomas Canavan saw that his strum had caught fire and said to Colville that it was alight. The other said that he had not ignited his strum."

Your Lordships held that under this circumstance when Colville returned before the allowed time he was guilty of a contravention of the Order, and was acting outside the scope of his employment. It is true that the point was not specially argued but if the appellant's argument in the present case was right that case would be wrongly decided. I am therefore of opinion that the appeal fails and should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I entirely agree.

---

(1) [1921] 1 A. C. 329.

H. L. (Sc.)
1922
COSTELLO
v.
ROBERT
ADDIE
& SONS'
COLLIERIES,
LD.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, January 20, 1922.

Agents for the appellant: *Deacon & Co., for Hay, Cassels & Frame, Hamilton, and Simpson & Marwick, Edinburgh.*

Agents for the respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1922
Jan. 20.

COLTNESS IRON COMPANY, LIMITED . APPELLANTS;

AND

BAILLIE . . . . RESPONDENT.

Workmen's Compensation—Accident arising out of Employment—Miner—Shot Firing—Misfire—Breach of Statutory Regulations—Added Peril—Explosives in Coal Mines Order of September 1, 1913, *para.* 3 (*a*)—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, which provides that "if a shot misses fire the person firing the shot shall not approach or allow any one to approach the shothole" until after a given interval, applies only to the person who actually fires the shot.

Accordingly, where a father, who was engaged along with his two sons in a blasting operation, loaded and stemmed the shothole and inserted the fuse, to which a light was applied by one of his sons, and, believing that the fuse had not been effectually lighted, approached the shothole within the prohibited period for the purpose of lighting the fuse afresh, and the shot exploded and injured him:—

Held, that in approaching the shothole he had not violated any statutory regulation and was not acting outside the scope of his employment, and that he was therefore entitled to compensation.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland affirming a determination of the sheriff-substitute of Lanarkshire under the Workmen's Compensation Act, 1906.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

The facts found by the sheriff-substitute were as follows :—

On April 5, 1920, the respondent, who was employed by the appellants as a miner in their Douglas Colliery, Douglas, was engaged, along with his sons William and John Baillie, getting coal in the Stoney Seam of said colliery and at a part thereof known as Baillie's Level, by pick and blasting.

The colliery was one in which the use of safety lamps was not required, and in which, subject to certain conditions, a shot might be fired by means of a naked light applied to a fuse, and by a person not appointed a shot firer.

Para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913, which was in force in the colliery, provided as follows : "If a shot misses fire the person firing the shot shall not approach or allow any one to approach the shothole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

On the morning of the day in question the respondent's son William Baillie bored a shothole, the respondent placed explosives and a detonator in the shothole, and stemmed the hole with packing, leaving the fuse attached to the detonator projecting from the shothole, for the purpose of firing the shot.

In Stoney Seam it was the practice of the miners to fire their shots at the same time in order that work should be interfered with as little as possible by the accumulation of smoke and reek.

The respondent's neighbours at the working face at the time were Robert Muncie, Robert Brown and a boy, who were getting coal by the same methods at an adjacent part of the face known as "Muncie's Heading," separated by about 20 feet of clear space (from which the coal had been removed) from Baillie's Level, and these neighbours had, on the morning in question, prepared a shot for firing at Muncie's Heading, the intention being that the two shots should be fired at the same time.

Robert Brown having intimated to the respondent that their shot at Muncie's Heading was ready for firing, and that their fuse was running, the respondent's son, William Baillie, applied his open light to the fuse at Baillie's Level for the purpose of firing their own shot.

On the light being applied the fuse showed no signs whatever of being ignited, and the respondent, his son William and the said Robert Brown, all of whom were present when the attempt was made, were under the bona fide belief that the said fuse at Baillie's Level had not been lighted.

The respondent and the other workmen named then left the face and retired to a safe distance pending the explosion of the shot at Muncie's Heading.

After Muncie's shot had exploded, the respondent, in the honest belief that his fuse had not been lighted and within the statutory limit of one hour from the time when the attempt (successful or unsuccessful) was made to light his own fuse, went back to the shothole at Baillie's Level with the intention of cutting off the end of the fuse and lighting it at a new point. Just as he had reached the shothole the shot exploded in his face inflicting serious and permanent injuries. The explosion of the shot at Baillie's Level was due either to the inner section of the fuse having been ignited by the application of William Baillie's lamp, or to a spark of flame from the shot fired at Muncie's Heading having reached the explosives in the charge at Baillie's Level.

From the facts the arbitrator found in law: (1.) That the shot fired or attempted to be fired by the respondent did not miss fire within the meaning of the regulation in question; (2.) that his exposure of himself to danger and his presence at the working face when the shot exploded was caused by mistake and inadvertence and by accident; (3.) that in so exposing himself to danger he was not guilty of serious and wilful misconduct since his contravention of the regulation—if there was a contravention—was unintentional; and (4.) that he was injured in the manner stated by accident arising out of and in the course of his employment by the appellants, within the meaning of the said Act. He therefore awarded the respondent compensation.

The questions of law for the opinion of Court were :—

(1.) Was the arbitrator right in the above finding in law holding that the shot which caused the respondent's injury had not missed fire within the meaning of para. 3 (*a*) of the Explosives in Coal Mines Order of September 1, 1913 ?

(2.) Were the remaining findings in law well founded ?

(3) On the foregoing facts was he entitled to find that the accident to the respondent arose out of and in the course of his employment with the appellants ?

Upon the appeal it was conceded that there was a misfire within the meaning of para. 3 (*a*) ; but the Second Division (the Lord Justice-Clerk, Lord Dundas and Lord Ormidale) held that the respondent, not being the person who fired the shot, was not contravening any statutory prohibition and that he was not adding any peril such as took him outside the sphere of his employment. They accordingly answered the first question in the negative and the third question in the affirmative.

1921. Dec. 9, 10. *Condie Sandeman K.C.* (of the Scottish Bar) and *Harold Beveridge* (of the English Bar) for the appellants. The respondent is disentitled to compensation because he was contravening a statutory regulation and was acting outside the sphere of his employment at the time when he sustained his injuries. Either he fired the shot by the hand of his son or he went into an interdicted area. The arbitrator throughout treats the shot as having been fired by the respondent, but he proceeded on the view that the shot did not miss fire. But it is now conceded that there was a misfire. The object of para. 3 (*a*) was to keep people away from the shothole. The rule no doubt contemplated that the person in command would fire the shot and was directed primarily to the case of a duly appointed shot firer. The provision that if a shot misses fire the person firing the shot shall not approach or allow any one to approach the shothole until after the lapse of a given interval clearly shows that this region was an interdicted region, otherwise any one who managed to evade the vigilance of the shot firer would have a right to go there. The implication is that the Legislature treated this as a dangerous area and that anybody going there was adding a risk to his employment. The fact that the shot firer is directed to prevent other people from approaching the shothole leads irresistibly to the inference that such other people cannot be acting within the scope of their employment in going to that dangerous place.

It is said that the respondent approached the shothole for the purpose of discharging his duties, but if a man breaks a statutory rule his state of mind is immaterial: *A. G. Moore & Co.* v. *Donnelly* (1); *Herbert* v. *Samuel Fox & Co.* (2)

C. D. Murray, Solicitor-General for Scotland (with him *J. C. Fenton* (of the Scottish Bar) and *Brightman* (of the English Bar)) for the respondent. The regulation is directed only against the person who actually fires the shot and means exactly what it says. Other persons are not within the rule and are therefore left to the general law and upon that the respondent has a finding of fact in his favour. This is a penal provision involving imprisonment. How then can it apply by implication? There is here no indictment of an area; the only prohibitions contained in the regulation are personal to an individual. It is impossible to spell out of the words of the provision a prohibition of the sphere of employment. It follows that the respondent has not committed a breach of the regulation and has done nothing to take him outside the scope of his employment.

Condie Sandeman K.C. replied.

The House took time for consideration.

1922. Jan. 20. Viscount Haldane. My Lords, in this case also I have had the opportunity of perusing the judgment which has been prepared by my noble and learned friend, Lord Dunedin, and I am entirely satisfied with the

(1) [1921] 1 A. C. 329, 347. (2) [1916] 1 A. C. 405.

conclusions as he has expressed them. My noble and learned friend, Lord Sumner, has requested me to say that he concurs.

VISCOUNT FINLAY. My Lords, I also concur in the judgment which has been prepared by my noble and learned friend, Lord Dunedin.

LORD DUNEDIN. My Lords, in this case, as in the preceding, two contiguous shots were arranged, though the distance between was about 20 instead of 3½ feet. The one was arranged by a man called Muncie. The other was arranged by a gang working together, composed of the respondent and his two sons, William and John Baillie. William bored the shothole, the respondent put in the explosives, did the packing, and arranged the fuse. Muncie having indicated that he was ready and proposed to fire, William Baillie applied his naked light to the fuse. He was under the impression that it had failed to light, but as Muncie's fuse was burning the party retired. Muncie's shot exploded, when, without waiting for the prescribed period, the respondent returned and his own shot exploded and injured him permanently.

The sheriff-substitute, as arbiter, found that the shot did not miss fire, and that, consequently, the rule did not apply. He also expressed the opinion that even if that was not so, yet in accordance with the decision in *Donnelly's Case* in the Court of Session (1) (for this award was issued before *Donnelly's Case* was reversed in your Lordships' House) (2), the respondent was not disentitled to receive compensation. In the Inner House the point as to missing fire was given up by the respondent's counsel, who admitted that there was a misfire in the sense of the order. Your Lordships are absolved from the consideration whether such an admission should hold good, because in accordance with the judgment in the preceding case there was a misfire. *Donnelly's Case* (3) being by this time decided in your Lordships' House, the learned

(1) (1920) 57 S. L. R. 380.

(2) [1921] 1 A. C. 329.

(3) [1921] 1 A. C. 329, 347.

judges of the Second Division held that, though not absolved in respect of that case, the respondent was not disentitled, as the rule did not apply to him, because he was not the firer of the shot. The appellants, the employer company, argued that the respondent was the firer of the shot, as he was in charge of the gang composed of himself and his two sons, and that a firing by the son was equivalent to a firing by himself. Alternatively, they argued that the provisions of the order as a whole made the neighbourhood of the shot a prohibited territory till after the expiration of the prescribed time, and that consequently the respondent, in going into that territory within the prescribed time, was acting outside the scope of his employment.

As to the first of these contentions, it is impossible to read the order without seeing that it is framed primarily with the intuitus of the duties of firing being performed by a regularly appointed shot firer. Such an appointment is prescribed as a necessity in many cases, but there are exceptions, and the position in this mine was admittedly one of them. The framers of the order have thought it sufficient to put an embargo on the firer of the shot himself, and to entrust to him the duty of keeping others away. This being so, I do not think that we, as judges, are entitled to spell out of the terms of the order a further restriction which may be truly according to the spirit, but is certainly not in any way expressed in the letter. The only person actually prohibited from approaching is the firer of the shot, and the respondent was not the firer of the shot.

As regards the second argument, it was pointed out by myself in *Conway's Case* (1) that there may be a prohibition as to entering a territory which would operate to make any action by the workman within that territory an action outside the scope of his employment. And, though *Conway's Case* was held by your Lordships in *Donnelly's Case* (2) to have been an erroneous determination in its application of the law to the facts, none the less the law as laid down in it was approved by your Lordships, as was expressed in the opinions

(1) 1911 S. C. 660.

(2) [1921] 1 A. C. 329.

H. L. (Sc.)
1922
Coltness Iron Co. v. Baillie.
Lord Dunedin.

delivered, especially that of the Lord Chancellor. But such a prohibition must, I take it, be clear and express. At any rate, I do not think that it may be gathered from such implications as would here be necessary in order to find it. Prohibition is laid on one man alone—namely, the shot firer. It would be easy to frame the order in such terms as "No one shall approach," etc. It is not so framed, and until it is so I do not think that we can find a universal prohibition. I am therefore of opinion that the decision of the Court of Session was right and the appeal fails and should be dismissed with costs.

Lord Shaw of Dunfermline. My Lords, I entirely agree.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 20, 1922.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *Deacon & Co., for Hay, Cassels & Frame, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.) * H. C. SMITH, LIMITED . . . . APPELLANTS ;

1922

AND

Feb. 14.

GREAT WESTERN RAILWAY COMPANY RESPONDENTS.

Carrier—Railway—Carriage of Goods—Special Contract—Owner's Risk—Loss of Goods—Wilful Misconduct—Inference from Conduct.

A trader delivered to a carman in the service of a railway company a parcel containing six pairs of men's boots for carriage by the company from Birmingham to Wilton, near Salisbury, on the terms that the company should not be liable for (inter alia) the loss of the goods except upon proof that the loss arose from the wilful misconduct of the company's servants. The goods reached the company's station at Birmingham, but were not delivered to the consignee. The trader, after endeavouring without success, in a correspondence extending over several months, to obtain from the company some explanation of what had happened to the parcel, sued the company in the county court for the value of the goods. In answer to interrogatories the defendants stated that as there was no record of the parcel's having been received at Wilton it was believed that it was lost and was not delivered to the consignee, but they offered no explanation of how the parcel was lost. At the trial the defendants called no evidence, but contended that the plaintiffs had failed to establish any case of wilful misconduct against them :—

Held, that the refusal of the defendants to account for the loss of the goods was not evidence which justified the Court in inferring that the loss arose from the wilful misconduct of the defendants' servants.

Curran v. *Midland Great Western Ry. Co. of Ireland* [1896] 2 I. R. 183 distinguished.

Order of the Court of Appeal [1921] 2 K. B. 237 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court, which reversed a judgment of the county court judge of Warwickshire.

On February 15, 1919, the appellants, who were boot and shoe merchants of Birmingham, delivered to one Moss, a carter in the service of the respondents, a parcel (duly packed and addressed) containing six pairs of men's boots for carriage and delivery by the respondents to a customer at Wilton, Salisbury. The parcel reached the respondents' parcels-collecting office at Snow Hill Station, Birmingham, where it was checked and weighed, but it was not delivered to the consignee and the appellants never heard of it again. The goods were consigned to the respondents under a general contract with the respondents for the carriage of goods at owner's risk.

---

* *Present :* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, and LORD WRENBURY.

(1) [1921] 2 K. B. 237.

That contract, so far as material, provided as follows:—

" General agreement for perishable and other goods to be carried by passenger train or by other similar service at owner's risk.

. . . .

" In reference to the above I/we request that all goods for which there are alternative rates by passenger train or other similar service delivered by me/us or on my/our account at any of your stations, for carriage by railway, may be carried at the lower rate (where and so long as such rate exists), except when specially consigned at the higher rate; and in consideration of your charging such lower rate I/we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods or a trader's truck or sheet (if any) containing or covering them, except upon proof that such loss, damage, misconveyance, misdelivery, delay or detention arose from the wilful misconduct of your servants."

After a correspondence between the parties in which the respondents declined to give any information to the appellants as to what had happened to the parcel the appellants sued the respondents in the county court for the value of the goods—10*l.* 11*s.* 6*d.*

The respondents, in answer to interrogatories administered to them, stated that as there was no record of the parcel's having been received at Wilton, it was believed that it was lost and was not delivered to the consignee, but they gave no explanation of how it was lost.

The correspondence and the answers to interrogatories are fully set out in the report of the case in the Court of Appeal and sufficiently appear from the judgment of Lord Buckmaster.

The respondents called no evidence at the trial but submitted that no case of misconduct had been made against them.

The county court judge, on the authority of *Curran* v. *Midland Great Western Ry. Co. of Ireland* (1), held that the evidence, in the absence of any explanation by the respondents, justified the inference of wilful misconduct and gave judgment for the appellants for the amount claimed.

The Divisional Court (Roche and Salter JJ.) reversed this decision and entered judgment for the respondents, and the Court of Appeal, by a majority (Bankes and Scrutton L.JJ.; Atkin L.J. dissenting) affirmed the decision of the Divisional Court.

1922. Feb. 13, 14. *R. A. Willes* for the appellants. This appeal raises the question of the liability of a railway company for non-delivery of goods consigned to them for carriage under an owner's risk contract. In this case there was evidence which justified the county court judge in drawing the inference that the non-delivery of the appellants' parcel was due to the wilful misconduct of the respondents' servants. The refusal of the respondents, after receipt of the parcel for carriage and delivery, to give any assistance to the appellants in seeking to recover their parcel or any information as to what had happened to it is good ground for inferring that the respondents wanted to keep back something, and the only thing that they could want to keep back was something which pointed to wilful misconduct. The decision of Palles C.B. in *Curran* v. *Midland Great Western Ry. Co. of Ireland* (1) is in point. That no doubt was a decision upon a contract framed in slightly different terms, but the general effect of the contract was the same as in this case. The decision proceeds upon the basis that where goods are delivered into the possession of a carrier there is a prima facie presumption that they continue to be in his possession until the contrary is shown, and, if he fails to deliver the goods and alleges no excuse, that is evidence which would justify the inference of fact that he still had the goods in his possession;

(1) [1896] 2 I. R. 183, 188.

and, having drawn that inference of fact, the learned Chief Baron held in law that the unexplained refusal to deliver the goods so continuing in the carrier's possession amounted to wilful misconduct for which an action would lie.

[He also referred to *Mahony* v. *Waterford, Limerick and Western Ry. Co.* (1) and *Neilson* v. *London and North Western Ry. Co.* (2)]

Further, the clause restricting the liability of the respondents applies only to the performance of the contract and there has been here no attempt to perform the contract at all. Bankes L.J. held that this point was not admissible, as it was not taken in the county court, but the plaintiffs, who were respondents in the Court of Appeal, in defending a judgment in their favour were entitled to raise any legal argument by which it could be supported. Their position differed in this respect from that of an appellant.

[LORD BUCKMASTER intimated that their Lordships would reserve the question of the admissibility of the argument until the judgment upon the merits.]

The conduct of the respondents in the circumstances justifies the inference that they had repudiated their contract to carry the appellants' goods, and they thereby precluded themselves from relying upon any condition excluding liability for loss or non-delivery.

Disturnal K.C. (with him *Douglas Bartley*) for the respondents. There is no evidence of any repudiation of their contract by the respondents and this point is not suggested in the judgment of the county court judge. So far as the evidence goes, the respondents at the time the goods were lost were acting in pursuance of their contract. Nor is there any evidence that the goods were lost through the wilful misconduct of the respondents' servants.

R. A. Willes replied.

LORD BUCKMASTER. My Lords, this case has been admirably presented by Mr. Willes; there was no argument which he has omitted and none he used that do not merit consideration. None the less I am of opinion that the appeal must fail. The claim out of which the appeal has arisen was brought by the appellant as the consignor of goods handed by him for carriage to the respondents, the Great Western Railway Company, and it is certainly not surprising in the circumstances that he has found himself aggrieved by the treatment that he received.

---

(1) [1900] 2 I. R. 273.

(2) [1921] 3 K. B. 213.

On February 15, 1919, he handed in Birmingham to one Moss, a servant of the company, a parcel of goods weighing 19 lb. and containing six pairs of boots, of the total value of 10*l.* 11*s.* 6*d.* The boots were properly packed and properly addressed to the consignee, who lived at Wilton, near Salisbury. The parcel was taken by Moss to the Snow Hill Station at Birmingham of the respondent company; it was there checked and weighed, and from that moment it has never been heard of again. Whether it was lost by accident, stolen by servants of the railway company or by strangers, damaged or destroyed, or mislaid by some unaccountable accident, the appellant does not know, and it is quite impossible that he can ascertain.

The claim that he makes against the railway company is resisted upon this ground: They say: "We never accepted these goods for carriage as common carriers at all. There were two well-known rates which we charge for the carriage of goods, a higher and a lower rate, and you took the lower rate under an agreement which provided that the goods should be carried by passenger train at owner's risk." The conditions expressed upon the face of that bargain show in plain terms that the special provisions which the consignor was asked to accept were provisions which were the consideration for the lower rate which he had to pay.

The agreement appears to be in common form, addressed to any consignor, and runs as follows: [His Lordship read the clause set out in the statement.]

The first question to determine is what is the true meaning of that condition? It has been suggested on the part of the appellant that it must be read as though it contained exceptions in favour of the railway company with a proviso reserving to the consignor rights in a certain event, and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts, and when that was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or, in other words, that the loss had arisen owing to the wilful misconduct of the company's servants.

I am unable so to regard this clause; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company. All he has been able to show is this: he has proved the delivery of the goods in the manner that I have mentioned to the railway company's servants, and he has put in evidence a correspondence between himself and the railway company, and their answers to certain interrogatories. I am bound to say that the correspondence does not reflect very creditably upon the attitude which the railway company adopted, and certainly does not show any anxiety on their part to satisfy one of their customers as to such of the circumstances as were within their knowledge, associated with the loss of these goods.

This correspondence begins on March 4, and contains a statement of the contents of the parcel and the address, and says that it " has not been delivered to addressee, apparently lost in transit." That is answered immediately on the next day by the railway company, saying that the letter " has been received, and the matter shall have immediate attention." " Immediate attention " apparently means attention at some time within the next three months, for nothing whatever happens between March 5 and June 6, when the solicitor for the appellants writes again to the railway company saying that he has had the papers handed to him, understanding that his clients have communicated, and asking that the railway company will let him know " by whom and when the said parcel was or should have been handled, and what has become of it, as it is necessary for my clients to make a claim against your company in respect of its non-delivery." That is answered on June 7, and the answer is " the matter shall have immediate attention "—exactly the same answer as had been given before; and nothing happens again from June 6 until June 27, when the solicitor once more writes and insists upon a reply, and then the solicitor to the railway company, on June 28, says: " I regret to inform you that the reason of the delay in this case is because the whole of the papers have been lost in transit." As to what the papers were, where they had been transferred to, how they originated, what information they contained, or why it was that their loss prevented any earlier reply, there is no information whatever to enable your Lordships to decide. It may be accepted that the correspondence preceding the institution of proceedings was correspondence in which the company took up the position that they did not intend to tell the plaintiff what had happened to his goods, or to give him any assistance whatever in establishing his claim. It may well be that that was a position which legally they were fully justified in adopting, but a little more consideration might well have been shown to their customer for a loss for which he certainly was not to blame.

The matter proceeded further after the action was instituted, for interrogatories were then exhibited for the railway company to answer, and of these interrogatory 2 was put in at the trial. It was in these terms: "(1.) On what date and at what time was the parcel referred to in the first interrogatory: (*a*) Dispatched by the defendants from Birmingham; (*b*) Received by the defendant company, their servants or agents at Wilton; (*c*) Delivered or tendered by the defendants their servants or agents to the consignee?" The answer to that was: "Inquiries have been made but the defendant company have no knowledge or means of knowledge; (*a*) As to whether said parcel was dispatched from Birmingham; (*b*) As to whether the said parcel was received by the defendant company, their servants or agents at Wilton—there is no record of such receipt; (*c*) As there is no record of the said parcel being received at Wilton it is believed the same was lost, never arrived at Wilton, and was never delivered or tendered to consignee." Of whom the inquiries were made, when they were made, what the result of the inquiries was, beyond the fact that they left the company without knowledge or means of knowledge, it is impossible to know; but with the evidence in that form the plaintiff proceeds to trial, and argues that wilful misconduct on the part of the company's servants must be assumed from the fact that the attitude of the company was only consistent with the culpability of their servants.

I find myself unable to accept that view. The materials disclosed by the letters and by the interrogatories are quite consistent with the position a litigant party is entitled to adopt, of saying: "Whatever my position may be I decline to render you the least assistance. I am not going to pay your claim, and I am not going to let you know any more than I am bound of the facts that will enable you to establish it." But this does not afford evidence which will enable the plaintiff to discharge the onus of proving what after all is a very serious fact, an act of wilful misconduct on the part of one of the company's servants. At the very best nothing more can be said than this, that no explanation was offered, and no explanation is not sufficient to enable the plaintiff to say this amounts to evidence of the fact that is unexplained.

The appellant, not unnaturally, relies strongly upon a case that was decided by Palles C.B. of *Curran* v. *Midland Great Western Ry. Co. of Ireland* (1), and although no Irish Report is per se authority in an English Court, the great legal position of the Chief Baron entitles all his utterances to be regarded with attention. This case, therefore, is one that requires examination. It was a case in which pigs had been delivered for carriage from Sligo to Manchester by the Midland Great Western Railway Company of Ireland. Some pigs apparently were not delivered at the place of destination, and some appear to have suffered from ill-feeding on the voyage. Proceedings were taken to recover against the railway company and the claim ultimately took the form of a special case. The contract upon which the plaintiffs sued provided that the company were to take the pigs at a reduced rate upon the condition that "they shall be free from all liability including liability for loss, injury or delay whether in the loading, unloading, transit, or conveyance of the animals unless such injury or delay shall be occasioned by the intentional and wilful neglect or misconduct of their servants acting within the scope of their authority." It has been pointed out by Bankes L.J. in the Court of Appeal that in point of actual language there is a general exclusion from liability for loss, and that it is only in case of injury or delay that liability can be established if it be due to the wilful neglect or misconduct of the servants. I do not think that that matter really materially influenced the judgment of the learned Chief Baron, because I find that the principle upon which he relied to support his judgment was this: that the pigs "having been received into the possession of the defendants, there is a prima facie presumption that they continued to be in their possession until the contrary is shown or until a different presumption arises from the nature of the subject. . . . Those circumstances" (he says) "are evidence from which a jury would be warranted in holding as matter of fact that the defendants had the pigs in their possession. If that inference in fact were drawn, then I hold as a matter of law that their unaccounted-for refusal to deliver them, so continuing in their possession, upon the plaintiffs' demand for them at the place and time at which they ought to have been delivered—of which there is ample evidence—amounted to wilful misconduct, for which this action will lie."

---

(1) [1896] 2 I. R. 183, 188.

Now, my Lords, in that case there had been no answer given at all on the part of the railway company to the request for information as to what had happened, but in the present case the evidence that was before the learned county court judge included the answers to the interrogatories, in which the defendant company had said that they had no knowledge as to whether the goods had been handed to them at Wilton, and that they believed that the same were lost and never arrived at Wilton. It is impossible to place such evidence on an exact parallel with the evidence which warranted the Chief Baron in assuming the possession of the pigs as a fact in the custody of the defendants, and then inferring from that possession that the refusal to give any explanation of their whereabouts or their existence was an act of wilful misconduct. My Lords, I desire to say nothing further about that authority, because for these reasons I do not think that it deals with the same facts as those in the present case, and it may be that on some later occasion the actual words of that judgment may come up for consideration.

So far, therefore, as the main part of this case is concerned, the appellant has completely failed, and this disposes of the case as it was opened and argued before the learned county court judge, although another point was raised by Mr. Willes in reply which he was excluded from raising in the Court of Appeal. I am far from saying that the Court of Appeal was mistaken in the course they took, and we have not heard counsel for the respondents upon the point. In dealing with this further argument therefore I express no opinion upon its strict admissibility. The point so raised is that there is no evidence to show that the contract of carriage was ever set on foot at all, and it is therefore incumbent upon the defendants to bring evidence for that purpose, since apart from the contract they would be in the position of bailees, and then they must excuse their non-delivery of the goods. I think the answer is to be found in the fact that the special contract was in evidence, that the goods were proved to have been carried by Moss from the place where they were handed in to the Snow Hill Railway Station at Birmingham, a fact only referable to this contract of carriage.

Then it was said that the defendants must show that the contract was not repudiated, because it is in reliance upon the express terms of the contract that they must seek to escape from the liability which the circumstances would otherwise cast upon them. That appears to me to be the result of some confusion of thought with regard to the form in which proceedings to recover damages in such a case should have been clothed. Mr. Willes has suggested that it would have been sufficient to have claimed that the goods were delivered for carriage, that they were not delivered to the consignee, and that liability consequently attached. But if in fact the defendants put up, as they would do, the terms of the contract in answer to that claim, it would be essential that the plaintiff should, unless he was in a position to deny the contract or the delivery of the goods upon its terms, accept the defence or he would be suing outside the only contract upon which he would have been entitled to recover. Whichever way the matter is approached, in the end the plaintiff must face the actual circumstances in which these goods were despatched, that is, that they were taken for carriage under the special terms of the special contract which enabled him to have them taken at the lower rate. If he desires to show that that contract was repudiated, it is then incumbent upon him to bring evidence to establish that repudiation, and it certainly is not incumbent upon the defendants to go into the box to prove that they did not repudiate it.

My Lords, for these reasons it is my opinion that this appeal should fail and should be dismissed with costs.

Lord Atkinson. My Lords, I concur.

Lord Sumner. My Lords, I concur. I think the reasons given by Bankes L.J. are quite sufficient to dispose of the case as it was presented in the Court of Appeal.

We have had an exceedingly interesting and thoughtful argument, putting a somewhat new aspect upon the matter, but I think that also fails. So far as the facts go, it was common ground that the contract was in course of being performed, and the last that we know of these boots is that they had started—not very far it is true—upon a transit which was to terminate at Wilton. I cannot find anything in this contract which justifies the contention, that before the term as to wilful misconduct can be brought into operation it is incumbent upon the defendants to show, that they had not repudiated but were performing the contract of carriage, which had been entered into.

With regard to the case of *Curran* v. *Midland Great Western Ry. Co. of Ireland*, I agree that it is distinguishable from the present case, and therefore I express no opinion upon it. If it were necessary to discuss that case I should certainly desire an opportunity of looking into it with great care, and I am not prepared to say with what result I might eventually consider it.

LORD WRENBURY. My Lords, I agree. When once it is realized that in the matter to which this action relates the railway company were not common carriers, and were not under any statutory obligation as to the terms on which they were prepared to carry, it follows that they stood in a position in which they were competent to make such contract as they thought proper, being one in which their customer was willing to concur. There was here a contract entered into by the railway company thus unfettered with their customer in the terms Lord Buckmaster has read. The only question, I think, for decision upon this appeal is whether there was before the county court judge any evidence upon which he could come to the conclusion that the plaintiff had affirmatively established that there was wilful misconduct on the part of the railway company's servants. I agree with what has been said. There was, I think, no such evidence.

As regards the question of repudiation by the railway company, I do not see myself that it arises. The plaintiff sued upon the contract and proved that transit under the contract had commenced. He alleged that there had been loss, and the only question to be determined was whether or not, there having been loss, it was occasioned by the wilful misconduct of the company's servants—a fact which it was for him to establish if it was set up. The railway company did not allege that the transit had not commenced and did not set up any contention that they did repudiate or could have repudiated the contract.

My Lords, as regards the Irish case I desire to protect myself (as Lord Sumner has done) in respect of any further consideration which it may be necessary to give to that case should it hereafter be cited in your Lordships' House. It differs from the present one both in the terms of the contract and in the fact that it proceeds upon a presumption that cannot be made when the plaintiff alleges, as he does here, that the goods are lost—namely, a presumption that the goods are still in the defendants' possession.

I think the appeal fails and must be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 14, 1922.

Solicitors for the appellants: *Ward, Bowie & Co., for W. L. Highway, Birmingham.*

Solicitor for the respondents: *A. G. Hubbard.*

[PRIVY COUNCIL.]

J. C.*
1921
Nov. 11.

In re THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Dominion—Combines and Fair Prices Act, 1919—*Property and Civil Rights—General Legislative Power of Dominion —British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91; *s.* 92, *head* 2.

The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorized the Board of Commerce, created by another statute of that year, to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces as that Board might consider to be detrimental to the public interest; the Board might also restrict accumulation of food, clothing, and fuel beyond the amount reasonably required, in the case of a private person for his household, and in the case of a trader for his business, and require the surplus to be offered for sale at fair prices; and the Board could attach criminal consequences to any breach of the Act which it determined to be improper:—

Held, that the Acts were ultra vires the Dominion Legislature, since they interfered seriously with "property and civil rights in the Provinces," a subject reserved exclusively to the Provincial Legislatures by s. 92, head 2, of the British North America Act, 1867, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding subjects outside the heads of s. 92 and within the general power given by s. 91. The power of the Dominion Legislature to pass the Acts in question was not aided by s. 91, head 2 (trade and commerce), since they were not within the general power; nor by s. 91, head 27 (the criminal law), because the matter did not by its nature belong to the domain of criminal jurisprudence.

APPEAL by special leave from the Supreme Court of Canada upon a case stated.

The appeal related to the validity of two Acts passed by the Parliament of Canada in 1919—namely, the Board of Commerce Act (9 & 10 Geo. 5, Dom., c. 37) and the Combines and Fair Prices Act (9 & 10 Geo. 5, Dom., c. 45). A case was stated under s. 32 of the first-named Act for the opinion of the Supreme Court of Canada as to the validity of an order made by the Board of Commerce under the Acts, restraining

---

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD PHILLIMORE, and LORD CARSON.

J. C.
1921
THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919, *In re.*

certain manufacturers of clothing in the City of Ottawa in respect of the sale prices of clothing.

The effect of the Acts in question appears from the judgment of the Judicial Committee.

The learned judges of the Supreme Court delivered their opinions on June 1, 1920, and being equally divided no judgment was rendered. Sir Louis Davies C.J. and Anglin and Mignault JJ. were of opinion that the order and the Acts upon which it was based were valid; Idington, Duff and Brodeur JJ. were of the contrary opinion. The proceedings in the Supreme Court are reported at 60 Can. S. C. R. 456.

1921. July 14, 15, 16. *Newcombe K.C.* and *T. Mathew* for the Attorney-General for Canada. It was within the powers of the Parliament of Canada under ss. 91 and 101 of the British North America Act, 1867, to constitute the Board of Commerce as a Court of record to enforce the Combines and Fair Prices Act, 1919. That Act dealt with public evils prevailing throughout the Dominion, not matters which were of a merely local nature, or otherwise competent to any Provincial Legislature. The legislation was therefore intra vires under the general power in s. 91 to legislate for the peace, good order, and government of Canada. The legislation also fell within the express words of s. 91, head 2 (the regulation of trade and commerce). It was not an attempt to regulate any particular trade, nor otherwise within the limitations which have been held to apply to that head: *Citizens Insurance Co.* v. *Parsons.* (1) If the legislation is within that, or any other, specific head of s. 91, it is not material that it is within s. 92 having regard to the final words of the latter section. The legislation also fell within s. 91, head 27 (the criminal law, etc.). The criminal provisions were to be administered by Provincial Courts, though no doubt the facts were to be passed by the Board. It is conceded that this head would not be applicable if the criminal provisions are merely provided as sanctions for provisions which are ultra vires; that however is not the case. The matter of

(1) (1881) 7 App. Cas. 96.

trade combines and profiteering was of such great importance that the Parliament of Canada had power to legislate even if it interfered to some extent with subjects reserved to the Provincial Legislature. That principle is recognized in the *Prohibition Case.* (1)

Sir John Simon K.C., *Lanctot K.C.* and *M. Alexander* for the Attorney-General for Quebec. The Acts were invalid, since they seriously interfered with civil rights in the Provinces, a subject within the exclusive legislative power of the Provinces by s. 92, head 2. The Board of Commerce Act by s. 39 provides that any order of the Board is to have effect as though enacted in the Act. If the order now under consideration were set out as part of the Act it obviously would interfere with the civil rights of the particular traders in Ottawa against whom it was made. The subject of the Acts was not "the regulation of trade and commerce." That head does not include the prohibiting a person from selling save at an arbitrarily fixed price: *Prohibition Case.* (2) Nor was the subject "the criminal law, etc." The penal provisions are merely ancillary. Further, the Board is constituted a Court of criminal jurisdiction, a Provincial matter under s. 92, head 14. The general words in s. 91 cannot be used to overcome specific heads of s. 92: *Prohibition Case* (3); *Insurance Act Case.* (4) The Acts were not passed during the war and the suggested principle that under abnormal conditions the general power of the Dominion may override the specific powers under s. 92 can have no application.

Geoffrey Lawrence for the Attorney-Generals of Ontario and Alberta.

Newcombe K.C. replied.

Nov. 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from the Supreme Court of Canada, before which were brought, under statute, questions relating to the constitutional validity of the Acts above mentioned. As the six judges who sat in the Supreme

---

(1) [1896] A. C. 348, 361.
(2) Ibid. 348, 362, 366.
(3) [1896] A. C. 348, 366.
(4) [1916] 1 A. C. 588, 595.

Court were equally divided in opinion, no judgment was rendered. The Chief Justice and Anglin and Mignault JJ. considered that the questions raised should be answered in the affirmative, while Idington, Duff and Brodeur JJ. thought that the first question should be answered in the negative and that therefore the second question did not arise. These questions were raised for the opinion of the Supreme Court by a case stated under s. 32 of the Board of Commerce Act, 1919, and were: (1.) Whether the Board had lawful authority to make a certain order; and (2.) whether the Board had lawful authority to require the Registrar, or other proper authority of the Supreme Court of Ontario, to cause the order, when issued, to be made a rule of that Court.

The order in question was to the effect that certain retail dealers in clothing in the City of Ottawa were prohibited from charging as profits on sales more than a certain percentage on cost, which was prescribed as being fair profit. The validity of this order depended on whether the Parliament of Canada had legislative capacity, under the British North America Act of 1867 to establish the Board and give it authority to make the order.

The statutes in question were enacted by the Parliament of Canada in 1919, and were to be read and construed as one Act. By the first of these statutes, the Board of Commerce Act, a Board was set up, consisting of three commissioners appointed by the Governor-General, which was to be a Court of Record. The duty of the Board was to be to administer the second of the two statutes in question, the Combines and Fair Prices Act, called the Special Act. It was to have power to state a case for the opinion of the Supreme Court of Canada upon any question which, in its own opinion, was one of law or jurisdiction. It was given the right to inquire into and determine the matters of law and fact entrusted to it, and to order the doing of any act, matter or thing required or authorized under either Act, and to forbid the doing or continuing of any act, matter or thing which, in its opinion, was contrary to either Act. The Board was also given authority to make orders and regulations with regard to these, and generally for carrying the Board of Commerce Act into effect. Its finding on any question of fact within its jurisdiction was to be binding and conclusive. Any of its decisions or orders might be made a rule or order or decree of the Exchequer Court, or of any Superior Court of any Province of Canada.

The second statute, the Combines and Fair Prices Act, 1919, was directed to the investigation and restriction of combines, monopolies, trusts and mergers, and to the withholding and enhancement of the prices of commodities. By Part I. the Board of Commerce was empowered to prohibit the formation or operation of combines as defined, and, after investigation, was to be able to issue orders to that effect. A person so ordered to cease any act or practice in pursuance of the operations of a combine, was, in the event of failure to obey the order, to be guilty of an indictable offence, and the Board might remit to the Attorney-General of a Province the duty of instituting the appropriate proceedings. By Part II. the necessaries of life were to include staple and ordinary articles of food, whether fresh, preserved, or otherwise treated, and clothing and fuel, including the materials from which these were manufactured or made, and such other articles as the Board might prescribe. No person was to accumulate or withhold from sale any necessary of life, beyond an amount reasonably required for the use or consumption of his household, or for the ordinary purposes of his business. Every person who held more, and every person who held a stock-in-trade of any such necessary of life, was to offer the excess amount for sale at reasonable and just prices. This, however, was not to apply to accumulating or withholding by farmers and certain other specified persons. The Board was empowered and directed to inquire into any breach or non-observance of any provision of the Act, and the making of such unfair profits as above referred to, and all such practices with respect to the holding or disposition of necessaries of life as, in the opinion of the Board, were calculated to enhance their cost or price. An unfair profit was to be deemed to have been made when the Board, after proper inquiry, so declared. It might call for returns and enter premises and inspect. It might remit what it considered to be offences against this part of the Act to the Attorney-General of the Province, or might declare the guilt of a person concerned, and issue to him orders or prohibitions, for breach of which he should be liable to punishment as for an indictable offence.

The above summary sufficiently sets out the substance of the two statutes in question for the present purpose.

In the first instance the Board stated, for the opinion of the Supreme Court of Canada, a case in which a number of general constitutional questions were submitted. That Court, however, took the view that the case was defective, inasmuch as it did not contain a statement of concrete facts, out of which such questions arose. Finally, a fresh case was stated containing a statement of the facts in certain matters pending before the Board, and formulating questions that had actually arisen. These related to the action of certain retail clothing dealers in the City of Ottawa. An order was framed by the Board which, after stating the facts found, gave directions as to the limits of profit, and a new case was stated which raised the questions already referred to.

In these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact the statutes in question.

The second of these statutes, the Combines and Fair Prices Act, enables the Board established by the first statute to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Provinces of Canada as the Board may consider to be detrimental to the public interest. The Board may also restrict, in the cases of food, clothing and fuel, accumulation of these necessaries of life beyond the amount reasonably required, in the case of a private person, for his household, not less than in the case of a trader for his business. The surplus is in such instances to be offered for sale at fair prices. Certain persons only, such as farmers and gardeners, are excepted. Into the prohibited cases the Board has power to inquire searchingly, and to attach what may be criminal consequences to any breach it determines to be improper. An addition of a consequential character is thus made to the criminal law of Canada.

The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada. No doubt the initial words of s. 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. The decision in *Russell* v. *The Queen* (1) appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants

---

(1) (1882) 7 App. Cas. 829.

J. C.
1921

THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919, *In re.*

of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce," if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under s. 92.

In the case of Dominion companies their Lordships in deciding the case of *John Deere Plow Co.* v. *Wharton* (1), expressed the opinion that the language of s. 91, head 2, could have the effect of aiding Dominion powers conferred by the general language of s. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces. (2) This result was the outcome of a series of well-known decisions of earlier dates, which are now so familiar that they need not be cited.

For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs

---

(1) [1915] A. C. 330, 339, 340.

(2) [1916] 1 A. C. 588.

J. C.
1921

THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919, *In re.*

to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

As their Lordships have already indicated, the jurisdiction attempted to be conferred on the new Board of Commerce appears to them to be ultra vires for the reasons now discussed. It implies a claim of title, in the cases of non-traders as well as of traders, to make orders prohibiting the accumulation of certain articles required for every-day life, and the withholding of such articles from sale at prices to be defined by the Board, whenever they exceed the amount of the material which appears to the Board to be required for domestic purposes or for the ordinary purposes of business. The Board is also given jurisdiction to regulate profits and dealings which may give rise to profit. The power sought to be given to the Board applies to articles produced for his own use by the householder himself, as well as to articles accumulated, not for the market but for the purposes of their own processes of manufacture by manufacturers. The Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application. This would cover such instances as those of coal mines and of local Provincial undertakings for meeting Provincial requirements of social life.

Legislation setting up a Board of Commerce with such powers appears to their Lordships to be beyond the powers conferred by s. 91. They find confirmation of this view in s. 41 of the Board of Commerce Act, which enables the Dominion Executive to review and alter the decisions of the Board. It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell* v. *The Queen* (1), both here and in the Courts in Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question

(1) 7 App. Cas. 829.

J. C.
1921
THE BOARD OF COMMERCE ACT, 1919, AND THE COMBINES AND FAIR PRICES ACT, 1919, *In re.*

should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures. It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the argument at the Bar for the Attorney-General for Canada. But even this consideration affords no justification for interpreting the words of s. 91, sub-s. 2, in a fashion which would, as was said in the argument on the other side, make them confer capacity to regulate particular trades and businesses.

For the reasons now given their Lordships are of opinion that the first of the questions brought before them must be answered in the negative. As a consequence the second question does not arise.

They will humbly advise His Majesty to this effect. There should be no costs of these proceedings, either here or in the Supreme Court of Canada.

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Attorneys-General for Quebec and Alberta: *Blake & Redden.*

Solicitors for Attorney-General for Ontario: *Freshfields & Leese.*

[PRIVY COUNCIL.]

J. C.*
1921
Nov. 18.

WILSON AND OTHERS . . . . APPELLANTS;

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada—Constitutional Law—Disallowance of Provincial Act—Accrued Title—Registration—Railway Lands—"Reasonable Proof"—3 & 4 Edw. 7 (B. C.), c. 54, s. 3—7 & 8 Edw. 7 (B. C.), c. 71—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 56, 90; *s.* 91, *head* 10.

Disallowance by the Governor-General of Canada, under ss. 56, 90 of British North America Act, 1867, of a Provincial Act in virtue of which a Crown grant of land in the Province has been issued before the disallowance, does not invalidate the title of the grantee. An absence of registration of the grant under a Land Registry Act of the Province is not material if the grantee before the disallowance applied for and was entitled to registration, whether or not under other circumstances absence of registration would invalidate the title.

Where the Lieutenant-Governor of a Province has authority by statute to issue Crown grants upon "reasonable proof" of certain facts, his function is judicial, but he is not bound to follow the rules regulating proceedings in a court of justice, and if there is before him some proof of the necessary facts, it is within his discretion to determine that there is "reasonable proof."

Local Government Board v. *Arlidge* [1915] A. C. 120 applied.

Provincial lands vested by statute in a railway company which has been declared by a Dominion statute to be "a work for the general advantage of Canada," within s. 91, head 10, of the British North America Act, 1867, are subject to a statute of the Province authorizing the issue of Crown grants of the lands, save so far as the lands are part of the "railway" as defined by s. 2, sub-s. 21, of the Railway Act (R. S. Can., 1906, c. 37).

Judgment of the Court of Appeal reversed.

APPEAL and CROSS-APPEAL from a judgment (February 3, 1921) of the Court of Appeal of British Columbia affirming, subject to a variation, a judgment (August 12, 1920) of Gregory J.

The action was brought by the respondent company in the Supreme Court of British Columbia to establish its title to the coal and other minerals underlying certain lands in Vancouver Island, which were vested in the company by a Dominion Crown grant dated April 21, 1887, and for a declaration that a Provincial Crown grant dated February 15, 1918, to the executors of one Ganner, and purporting to be made under the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917 (7 & 8 Edw. 7, B.C., c. 71), was null and void and for consequential relief. The appellants in the main appeal were Ganner's executors, the Attorney-General for British Columbia, and the Granby Consolidated Mining, Smelting and Power Co., Ld., which company claimed under a conveyance by Ganner's executors.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD CARSON, MR. JUSTICE DUFF, and SIR ROBERT STOUT.

The facts and the relevant statutory enactments appear from the judgment of the Judicial Committee.

The trial judge (Gregory J.) gave judgment for the respondents, being of opinion that they had not had a proper hearing upon the application by Ganner's executors for the Crown grant. Upon appeal to the Court of Appeal the judgment in favour of the respondents was affirmed (McPhillips J. dissenting) with a variation with regard to the measure of damages. The learned judges who formed the majority were of opinion that there was no proper hearing and that there was not "reasonable proof" within s. 3 of the Act of 1904 justifying the issue of the Crown grant.

The cross-appeal was as to the measure of damages; upon that question the arguments are not reported.

1921. July 25, 26. *Sir John Simon K.C.*, *Hon. Sir M. Macnaghten K.C.*, and *H. B. Robertson K.C.* for the appellants. The British North America Act, 1867, by s. 56 provides that the disallowance of an Act "shall annul" it. The effect is to "annul" everything done under the disallowed Act. It is not contended that a disallowance is the same in effect as a refusal by the Lieutenant-Governor to assent to an Act; or that it entitles the appellants to claim mesne profits. Disallowance operated as a defeasance of the grantees' title. The cases as to the effect of the repeal of an Act afford little

J. C.
1921
WILSON
v.
ESQUIMALT
AND
NANAIMO
RY. CO.

help, but reference may be made to *Kay* v. *Goodwin* (1) and *Surtees* v. *Ellison.* (2) Secondly, the railway having been declared to be a work for the general advantage of Canada, was removed from the Provincial legislative authority by s. 91, head 29, and s. 92, head 10. The appellants had the right to carry their line through the railway belt where they chose, and that right could not be interfered with under a Provincial statute: *Attorney-General for Alberta* v. *Attorney-General for Canada* (3); *Attorney-General for British Columbia* v. *Canadian Pacific Ry.* (4) Thirdly, the Crown grant was ineffective because it was not registered under s. 104 of the Land Registry Act. The application to register does not help the grantee because the appellants were already on the register. The Settlers' Act did not direct the registrar to remove the appellants' name, and after the disallowance the grantee had no right to have his name substituted.

Fourthly, the grant under the Settlers' Act was invalid in that the appellants had not a proper opportunity to place their objections before the Lieutenant-Governor, and he acted without reasonable proof. He was bound to act judicially: *Local Government Board* v. *Arlidge.* (5) That duty was increased by the fact that the issue of a grant acted as a forfeiture of the appellants' title. [Reference was also made to *Esquimalt & Nanaimo Ry. Co.* v. *Granby Consolidated Mining Co.* (6); *Esquimalt & Nanaimo Ry. Co.* v. *Wilson* (7); and *Esquimalt & Nanaimo Ry. Co.* v. *Fiddick.* (8)]

S. S. Taylor K.C. for the respondents, being called on only as to the question of ultra vires, said that the respondents did not contend that the Crown grant entitled them to interfere with the appellants' railway rights.

Nov. 18. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. This is an appeal from the judgment of the Court of Appeal of British Columbia of February 3, 1921, affirming the judgment of the trial judge, Gregory J., in

(1) (1830) 6 Bing. 576.
(2) (1829) 9 B. & C. 750.
(3) [1915] A. C. 363.
(4) [1906] A. C. 204.
(5) [1915] A. C. 120, 150.
(6) [1920] A. C. 172.
(7) [1920] A. C. 358.
(8) (1908) 14 B. C. Rep. 412.

favour of the respondent company in which their Lordships have to consider the effect of the Vancouver Island Settlers' Rights Act of 1904 and of the amending Act of 1917 that was subsequently disallowed, as well as the effect of that disallowance upon the rights of the grantees under Crown grants issued by authority of those enactments.

Two actions were brought by the respondent company to establish its title to certain lands comprised in a grant to the appellants professedly made under the authority of the statutes mentioned.

A history of the legislation and other public and private proceedings and transactions affecting more or less directly the land whose title is in controversy would be a rather voluminous one, but it is unnecessary now to enter into that history in detail. Admittedly, these lands are situated in a considerable district in Vancouver Island known as the Esquimalt and Nanaimo Railway Belt; a tract of land granted by a Provincial statute to the Dominion Government in execution of the terms of an arrangement arrived at in the year 1883 in settlement of disputes between the two Governments, and in turn by the Dominion Government, pursuant to the same arrangement, granted to the Esquimalt and Nanaimo Railway Company (the respondent company) as a subsidy in aid of the construction of a line of railway (the Esquimalt and Nanaimo Railway) in Vancouver Island. But for the legislation of 1904 and 1917 the respondent company's title would be indisputable.

In 1904 the Vancouver Island Settlers' Rights Act was passed by the Legislature of British Columbia; the relevant provisions of it being these: "Sect. 2. In this Act, unless the context otherwise requires: (*a*) 'Railway Land Belt' shall mean the lands described by Section 3 of Ch. 14 of 47 Vict., being 'An Act relating to the Island Railway, the Gravingdock, and Railway lands of the Province.' (*b*) 'Settler' shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon.

J. C.
1921
Wilson
v.
Esquimalt
and
Nanaimo
Ry. Co.

"Sect. 3. Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of Ch. 14 of 47 Vict., with the bona fide intention of living on said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied by said settler."

By a judgment of this Board in *McGregor* v. *Esquimalt & Nanaimo Ry. Co.* (1) it was decided that a grant under the statute of 1904 had the effect, as to the lands comprised in the grant, of displacing the title of the railway company and vesting a title in fee simple in the grantee. The time limit of twelve months fixed, by s. 3 of the statute of 1904, was extended by a statute of 1917 to September 1 of that year.

On July 5, 1917, the appellants, Wilson and McKenzie, as executors of Joseph Ganner, deceased, applied under the Act of 1917 for a Crown grant of the lands in dispute alleging that Joseph Ganner in his lifetime and before December 19, 1883, the relevant date mentioned in s. 3 of the Act of 1904, had improved these lands with a bona fide intention of living thereon; this allegation being supported by statutory declarations of the executors and others. The late Joseph Ganner had already in his lifetime received a conveyance of these lands, "less the right of way for the railway," by deed reserving to the company the right to take timber for railway purposes, "rights of way for their railway" and the right to enter and to take such land as might be required for stations and workshops and excepting all minerals including coal; and subsequently, pursuant to this application on February 15, 1918, a Crown grant was issued purporting to convey to Wilson and McKenzie, as executors of Ganner, a title in fee simple to the land applied for, subject only to

(1) [1907] A. C. 462.

certain exceptions and reservations in favour of the Crown. On May 30, 1918, the Governor-General by an Order in Council disallowed the Act of 1917.

The Court of Appeal, with the exception of McPhillips J., who dissented, concurred with the trial judge, Gregory J., in holding, though not precisely upon the same grounds, that the authority vested in the Lieutenant-Governor in Council by the statutes of 1904 and 1917 was subject to certain conditions that had not been observed in the proceedings resulting in the issue of the grant, which they decided was consequently invalid. The questions which thus engaged the attention of the Courts below will require discussion, but, in the meantime, it is more convenient to deal with the points arising in consequence of the fact that in the year 1905, that is to say, after the passing of the Act of 1904, but before the passing of the Act of 1917, the "railway" of the respondent company was, by an Act of Parliament of Canada (c. 90, s. 1), declared to be "a work for the general advantage of Canada"; the word "railway" in this statute signifying by force of s. 2, sub-s. 21, of the Dominion Railway Act (R.S. Can., 1906, c. 37): "Any railway which the company has authority to construct or operate, and . . . . all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property, real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorised to construct."

Upon the passing of the Act of 1905, in virtue of the enactments of s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, the "railway" of the respondent company passed within the exclusive legislative jurisdiction of the Parliament of Canada and, accordingly, their Lordships think the Legislature of the Province ceased to possess the authority theretofore vested in it under head 10 of s. 92 and head 13 of the same section of that Act, to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be "a work for the general advantage of Canada," and to vest that title in another. It does not follow, however, that lands

J. C.
1921
WILSON
v.
ESQUIMALT
AND
NANAIMO
RY. CO.

acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its "railway" or of its undertaking as a railway company were withdrawn from the legislative jurisdiction of the Province in relation to "property and civil rights"; and, in their Lordships' opinion, that authority was, notwithstanding the enactment of the Dominion Act of 1905, still exercisable in relation to such subjects.

On the other hand, as their Lordships have already noticed, the railway company was, by virtue of the stipulations contained in the conveyance to Ganner, the owner of certain rights (to take timber for railway purposes, rights of way for the railway, to take land for stations and workshops), which rights, it cannot be denied, were held by the company as part of its railway undertaking. Whether or not they were actually part of the "work," that is to say of the "railway" declared to be "a work for the general advantage of Canada," these rights were so identified with the railway undertaking as to justify the most serious doubts whether they could legally be swept away or impaired by Provincial legislation. And it was with entire propriety that Mr. Taylor, as counsel for the appellants, agreed that all lands and all such rights as ought to be considered as part of the railway undertaking should be treated as excluded from the operation of the grant.

Indeed, the real controversy seems to concern the coal only, and as regards the coal it appears to have been so dealt with that it would be impossible to regard it as any longer a part of the railway undertaking, though in respect of the working of it, in so far as such working may affect the railway, all parties are of course under the control of the Board of Railway Commissioners.

The question that was principally discussed before their Lordships' Board was that presented by the contention of the respondent company concerning the effect of the disallowance of the Act of 1917, by which it is argued the grants already made to the appellants are nullified. In relation to this question the pertinent sections of the British North America

J. C.
1921
Wilson
v.
Esquimalt
and
Nanaimo
Ry. Co.

Act are ss. 56 and 90. By the first of these a power of disallowance in respect of Dominion Acts is vested in the Queen in Council; by s. 90 the provisions of s. 56 are (inter alia) made applicable to statutes passed by the Provincial legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years named in s. 56 being reduced to one year.

Textually, s. 56 is as follows: "Where the Governor-General assents to a Bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by a Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate by the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the day of such signification." For the purposes of the present appeal the point under examination turns, as their Lordships think, upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification."

Cases may no doubt arise giving place for controversy touching the application of this phrase, but their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the disallowance of a Provincial statute shall be inoperative.

It is important in construing such a provision to consider the probable tendency of any proposed construction in relation to its effect upon the working of the constitutional system set up by the British North America Act, and from this point of view the construction advocated by the appellants is open to two objections of not a little weight. If private rights that have been finally constituted under Provincial legislation are swept away by disallowance—which may take place at any time up to the expiration of a year after the enactment of the legislation—then Provincial legislation may obviously become the subject of a considerable degree of doubt as to its ultimate operation and effect. This uncertainty would, of course, be much limited in its practical incidence by recognized constitutional conventions restricting the classes of cases in which disallowance is permissible; but it is indisputable that in point of law the authority is unrestricted, and under conceivable conditions the uncertainty touching the fate of Provincial enactments might be productive of some degree of general inconvenience. Another objection of some practical importance lies in the probability that under the proposed construction the Dominion Government when considering the advisability of disallowing a Provincial enactment in circumstances making the exercise of the power proper and desirable on general grounds would encounter embarrassments (otherwise not likely to arise) by reason of apprehensions as to the consequences of its action upon the rights and interests of private individuals.

It was urged by counsel for the respondent company that these considerations have no relevancy in the present controversy, since (it is argued) by force of s. 104 of the Land Registry Act the Crown grant upon which the appellants' right is founded could not vest a title or an interest in the lands comprised in the grant until the grant had been registered in the proper Land Registry Office; and that, admittedly, registration had not in fact taken place at the time the Act was disallowed.

The appellants (to advert briefly to the facts), having applied for the registration of their title, were met with the objection that a lis pendens having been filed in the action out of which this appeal arises (and in another action which has since been dismissed), the title ought not to be registered until the lis pendens had been removed. To this objection the registrar gave effect, and his decision, which had been reversed by the Court of Appeal, was, on appeal to His Majesty in Council, eventually sustained.

Their Lordships have now to decide whether or not the actions in respect of which the lis pendens was filed should be dismissed and the lis pendens vacated. And their Lordships having for the reasons now given, some of which are yet to be explained, come to the conclusion that the actions are not well founded, it follows that the appellants had, when they applied for registration, a completely constituted right to register their title; though the exercise of that right was, in consequence of the proceedings taken by the respondent company, suspended pending the determination of the questions which the company itself had raised. Their Lordships entertain no doubt that such a right is one of the class of rights intended to be protected by s. 56 of the British North America Act.

It should not, however, be assumed that their Lordships are in accord with the contention that s. 104 of the Land Registry Act applies either to grants of a special character, such as those authorized by the legislation of 1904 and 1917, or to ordinary Crown grants issued under the authority of the Land Acts. On these points their Lordships express no opinion.

The last point for consideration arises in consequence of the contention of the respondent company (to which the Court of Appeal gave effect) that the powers of the Lieutenant-Governor in Council under the legislation of 1904 and 1917 were not validly exercised, inasmuch as certain conditions, some expressly, others impliedly, attached to those powers were not observed.

The statute of 1904 no doubt requires that before the authority to issue a Crown grant under s. 3 is acted upon, the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" of "improvement" or "occupation" and of intention to reside; and their Lordships consider that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must, to adapt the language of Lord Moulton in *Arlidge's Case* (1), "preserve a judicial temper" and perform his duties "conscientiously with a proper feeling of responsibility" in view of the fact that a

---

(1) [1915] A. C. 120, 150.

J. C.
1921
Wilson
v.
Esquimalt
and
Nanaimo
Ry. Co.

decision in favour of the applicant must result in the transfer to the applicant of property to which, but for the statute and but for the production of the necessary proof, the respondent company (or its successors in title) would have possessed an unassailable right; and it may be assumed for the purposes of this appeal that a grant issued in consequence of a decision arrived at through proceedings wanting in these characteristics would be impeachable by the respondent company (or its successors), as issued without authority or in abuse of the authority which the statute creates.

There are two grounds upon which this contention is supported.

First it is said that the respondents were denied an adequate opportunity of showing that the essential allegations made on the application were not well founded in fact, and second that in the material produced there was no "reasonable proof" of those allegations.

The second of these grounds is that upon which the judgment of the majority of the Court of Appeal proceeded. The judgment of the learned Chief Justice, with whom Galliher J. concurred, contains a searching examination of the evidence adduced, leading him to the conclusion that no such "reasonable proof" was before the Lieutenant-Governor in Council. The reasons of the learned Chief Justice are cogent reasons in support of the conclusion that the allegations of the appellants' petition were not supported by complete evidence; but their Lordships do not think that this, if established to the satisfaction of the Court of Appeal, was necessarily conclusive in favour of the respondent company.

Whether or not the proof advanced was "reasonable proof" was a question of fact for the designated tribunal, and the decision by the Lieutenant-Governor in Council in the affirmative could not be questioned in any Court so long, at all events, as it was not demonstrated that there was no "proof" before him which, acting judicially, he could regard as reasonably sufficient.

This the majority of the Court of Appeal has held to be shown. But the Chief Justice, at all events, who examined the evidence in detail, and Galliher J. (who concurred with him), proceeded largely upon the view that, generally, the deponents seem to speak without personal knowledge of the facts to which they depose, and such statements he seems to put aside entirely as valueless if not altogether incompetent. Their Lordships think the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received. Ganner, as already mentioned, did in fact acquire the surface rights in 1885; and the proof includes formal depositions by the executors and others to the effect that Ganner "squatted" on the land in question in 1883 with the intention of residing thereon, and that he was in that year engaged in improving it, as well as a statement by his son that he, with others, personally assisted in working on this land preparatory to "clearing" it in that year. While appreciating both the relevancy and the force of the comments made upon this evidence in the Court below, their Lordships are constrained to think that there was some evidence in support of the application, and that there is no adequate reason for holding that this evidence might not be properly considered to be reasonably convincing.

Similar considerations apply to two other criticisms upon the course taken by the Lieutenant-Governor in Council, those, namely, touching the refusal to direct the production of the deponents for cross-examination, and the refusal to grant an adjournment for the purpose of enabling the company to adduce evidence in opposition to the application.

The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might desire to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that

J. C.
1921
WILSON
v.
ESQUIMALT
AND
NANAIMO
RY. CO.

further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case (1), that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.

It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

On these grounds their Lordships consider that the appeal in substance succeeds. The respondent company is, however, for the reasons mentioned, entitled to a declaration that the Crown grant does not operate to take away or to prejudice the company's title to its right of way as at present established, or to its rights under the deed of conveyance to Ganner of 1890, already mentioned, to take timber and to use the surface for railway purposes. As no contention in respect of these rights of the company appears to have been seriously pressed in the Courts below it may be assumed that they are of little or no practical value; and their Lordships, therefore, think that the respondent company's success upon this minor point should not affect the question of costs.

For these reasons their Lordships think that the appeal should be allowed with costs here and of the appeal to the Court of Appeal and the actions dismissed with costs throughout, and subject to the declaration above mentioned, that the cross-appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

---

(1) The appeal *Esquimalt & Nanaimo Ry. Co.* v. *Dunlop* raised the same questions of law as the appeal here reported, and was heard at the same time. Their Lordships dismissed the appeal subject to the variation directed in the present case.

Solicitors for appellants: *White & Leonard.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.*
1921
Nov. 25.

BURLAND AND ANOTHER . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC, APPEAL SIDE.

ALLEYN AND OTHERS . . . . APPELLANTS;

AND

BARTHE . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Legislative Authority of Province—Succession Duty—Movable Property outside Province—Direct Taxation within Province—Invalidity of Statute—Pleading—7 Edw. 7 (Queb.), c. 14—4 Geo. 5 (Queb.), cc. 10, 11—British North America Act, 1867 (30 *&* 31 *Vict, c.* 3), *s.* 92, *head* 2.

The Quebec Succession Duty Act (6 Edw. 7, c. 11), as amended by 7 Edw. 7, c. 14, which imposes succession duty in respect of property outside the Province upon the death of the owner domiciled within it, is ultra vires the legislative power of the Province under s. 92, head 2, of the British North America Act, 1867, since the duty imposed is not "direct taxation" having regard to the provisions for its collection.

Cotton v. *The King* [1914] A. C. 176 discussed and followed.

But, the Quebec Succession Duty Act (4 Geo. 5, c. 10), imposing a duty upon "all transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death" is intra vires s. 91, head 2, being "direct taxation within the Province."

---

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, VISCOUNT CAVE, LORD PHILLIMORE, and LORD CARSON.

J. C.
1921

BURLAND
v.
THE KING.
ALLEYN
v.
BARTHE.

According to the rules of pleading, an allegation of infirmity in a statute on the ground of ultra vires is sufficient without assigning further reasons.

Judgment of the Court of King's Bench reversed, and judgment of the Supreme Court of Canada affirmed.

APPEALS (heard together), the first from a judgment (April 3, 1918) of the Court of King's Bench for the Province of Quebec, affirming a judgment (June 26, 1914) of the Superior Court of that Province; the second, by special leave, from a judgment (February 3, 1920) of the Supreme Court of Canada, reversing a judgment (June 27, 1919) of the Court of King's Bench, and restoring a judgment of the Superior Court.

The appeals related to statutes of the Province of Quebec imposing succession duty in respect of movable property situate outside the Province upon the death of persons domiciled in the Province.

In the first appeal (*Burland* v. *The King*) the death occurred in May, 1907, and the duties had been claimed and paid under 6 Edw. 7, c. 11, as amended by 7 Edw. 7, c. 14 (arts. 1191*b*, *c*, *g*, of R. S. Q. 1888). The appellants filed a petition of right in September, 1909, alleging that the enactment was ultra vires and seeking to recover a sum consisting in part of duty paid in respect of movable property situate outside the Province, and in part of a higher rate of duty paid upon property within the Province by reason of the duty being imposed upon the entire property. After the hearing by the trial judge the proceedings stood over pending the decision of the Supreme Court in *Rex* v. *Cotton*. (1) The declaratory Act (4 Geo. 5, c. 10) was passed on February 19, 1914, to overcome the defect in the legislation appearing by the judgment of the Board on appeal in that case (2), but by s. 3 that Act did not apply to "pending cases." The trial judge (Lemieux C.J.) delivered judgment on June 26, 1914, dismissing the petition. That judgment was affirmed on appeal to the King's Bench by a majority (Archambeault C.J. and Lavergne and Carroll JJ.; Pelletier and Cross JJ. dissenting).

(1) (1912) 45 Can. S. C. R. 469.

(2) [1914] A. C. 176.

In the second appeal (*Alleyn* v. *Barthe*) the death had occurred on July 13, 1919. Succession duty in respect of property situate outside the Province was claimed under 4 Geo. 5, c. 10 (arts. 1387*b*, *g*, *h* (6.) of R. S. Q., 1909); by s. 2 of the Act it applied to past transmission where the duty was unpaid. The appellants contested the claim, contending that the statute was ultra vires. The trial judge (Lemieux C.J.) held that the Act was intra vires and the duty payable. That judgment was reversed by a majority of the King's Bench, Appeal Side (Cross, Pelletier, and Martin JJ.; Lamothe and Carroll JJ. dissenting). Upon a further appeal to the Supreme Court of Canada that Court (Davies C.J. and Idington, Duff, Anglin and Mignault JJ.) unanimously reversed the judgment of the King's Bench and restored the judgment of the trial judge. The proceedings in the Supreme Court are reported at 60 Can. S. C. R. 1.

The terms of the relevant statutory provisions in both appeals are set out in the judgment of the Judicial Committee.

1921. July 14, 15, 18, 19. *Newcombe K.C.* and *J. W. M. Holmes* (*Markey K.C.* with them) for the appellants in *Burland* v. *The King*; *Newcombe K.C.* and *Geoffrey Lawrence* (*Meredith K.C.* and *Gravel K.C.* with them) for the appellants in *Alleyn* v. *Barthe.* In the first appeal the statute under which the duty was paid was ultra vires under the British North America Act, 1867, s. 92, head 2, since the taxation for which it provided was not "direct taxation." On that question the decision of the Board in *Cotton* v. *The King* (1) is conclusive. The petition of right was a "pending case" within s. 3 of 4 Geo. 5, c. 11; accordingly that Act, which was designed to overcome the objection on which the judgment of the Board proceeded, does not apply. The statute relevant in the second appeal (4 Geo. 5, c. 10) was ultra vires under s. 92, head 2. First, because it was not "direct taxation." By arts. 1387*g* and 1387*h* no title vested in any person until the duty was paid; the result is that the executor or administrator has to pay the duty. Even if the

---

(1) [1914] A. C. 176.

J. C.
1921
Burland
v.
The King.
Alleyn
v.
Barthe.

property vests in the executor he is obliged to pay the duties before effect can be given to the will: *Blackwood* v. *The Queen.* (1) Secondly, if the statute does impose the tax now claimed, it is not taxation "within the Province," and is consequently ultra vires under s. 92, head 2. The principle "mobilia sequuntur personam" cannot be used to enlarge the Provincial power under that head: *Woodruff* v. *Att.-Gen. for Ontario* (2); *Rex* v. *Lovitt.* (3) Although the taxation purported to be imposed upon the transmission, it was in fact imposed upon the property itself. The legislation considered in *Cotton* v. *The King* (4) also used the word "transmission," but is referred to by the Board as being imposed on the property. But on the true construction of the Act the tax was not payable, because the transmission was not in the Province but where the property was situate. The property was transmitted by the law of the situs, although the Court in situ might adopt the law of the domicil of the donor. [Reference was also made to *Lambe* v. *Manuel* (5), *Blackstone* v. *Miller* (6), and to the definition of "succession" in art. 576 of Civil Code of Lower Canada.]

Sir John Simon K.C. and *Lanctot K.C.* (*St. Laurent K.C.* and *M. Alexander* with them) for the respondents. The taxation was taxation within the Province. The respondents rely upon the reasoning of Duff J. in *Rex* v. *Cotton* (7), which was not affected by the judgment of the Board on appeal. A sovereign State can impose a duty upon a succession within its territory to movables locally situate outside that territory: *Thomson* v. *Advocate-General* (8); *Wallace* v. *Attorney-General* (9); *Colquhoun* v. *Brooks.* (10) That power exists in a colonial legislature: *Harding* v. *Commissioners of Stamps for Queensland* (11); and was recognized in Quebec before confederation: Civil Code of Lower Canada, arts. 6, 599, 600. The power of the Provinces in this respect was not limited by the British North America

---

(1) (1882) 8 App. Cas. 82.
(2) [1908] A. C. 508.
(3) [1912] A. C. 212.
(4) [1914] A. C. 176, 193.
(5) [1903] A. C. 68, 71, 72.
(6) (1902) 188 U. S. 189.
(7) (1912) 45 Can. S. C. R. 469, 503 et seq.
(8) (1845) 12 Cl. & F. 1.
(9) (1865) L. R. 1 Ch. 1.
(10) (1889) 14 App. Cas. 493, 503.
(11) [1898] A. C. 769.

Act, 1867, provided that the taxation was direct and for Provincial purposes. That contention is strongly supported by *Lambe* v. *Manuel.* (1) In *Woodruff's Case* (2) there had been a transfer inter vivos by delivery outside the Province, and the principle applicable to succession did not apply. *Rex* v. *Lovitt* (3) shows merely that there may be taxation in the Province of the situs for the purpose of legal representation, collection, or administration, in addition to succession duty in the Province of the de cujus. The questions in these appeals are therefore whether the statutes do in fact impose the duties claimed, and if so whether the taxation is direct. In both appeals the statutes under consideration clearly purport to impose the duty upon movables locally situated outside the Province. In the first appeal the petition of right, which owing to its nature cannot be amended, took no point as to the taxation not being direct. The view of the Board in *Cotton* v. *The King* (4), even if not obiter, does not affect this case. Further, that point not having been raised by the petition, the case was not a "pending case" within s. 3 of 4 Geo. 5, c. 11, and that statute applied and removed any objection founded on that case. In the second appeal the taxation was direct, since the effect of art. 1387*g* is that nobody but the beneficiary is to be made liable. The statute applies only to "transmissions within the Province."

Newcombe K.C. in reply. In the first appeal *Cotton* v. *The King* (4) is conclusive, and in the second *Woodruff's Case* (2) is directly in point. The legislation is invalid as retro-actively imposing a condition to succession under the law of the domicil.

Nov. 25. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The British North America Act of 1867, in sections that have been the subject of much criticism and explanation, defined and apportioned as between each Province and the Dominion of Canada, the various powers

(1) [1903] A. C. 68, 71, 72.
(2) [1908] A. C. 508.
(3) [1912] A. C. 212.
(4) [1914] A. C. 176.

J. C.
1921
BURLAND
v.
THE KING.
ALLEYN
v.
BARTHE.

of taxation that each element of the Constitution was to exercise and enjoy. With regard to the Provinces, the powers were conferred by s. 92 in words which had the appearance of simplicity, and by these exclusive power was given to the Provinces to make laws for "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

This power knows no limits save those prescribed in the section, but the endless variety of methods by which taxation can be imposed have from time to time caused the attempted use of this authority to be challenged, and the resulting decisions have not been free from criticism. One of such cases has recently come before the Board for consideration: *Cotton* v. *The King* (1); and its bearing on the present dispute will be plain when the facts of that case are once more analysed and compared with the circumstances in which the present appeals have arisen.

These appeals are two in number, independent in their history, but both have been heard together before this Board and can be dealt with together in one judgment, although the considerations affecting their decision are not the same.

George Burland died on May 22, 1907, at and domiciled in Montreal in the Province of Quebec and appointed Jeffrey Hale Burland, the appellants in the appeal No. 102 of 1919, which for convenience will be referred to as the Burland appeal, and William M. Walbank, executors of his will and codicil. The said J. H. Burland was one of the universal legatees under the will, and he made the declaration required by art. 1191*g* (1.) enacted by 6 Edw. 7, c. 11, as to the value of the property owned by the deceased that was situate both within and without the Province. He was accordingly required to pay a sum for succession duty on the whole estate by the deputy collector of Provincial revenue and this amount was paid by the executors under protest.

On September 23, 1909, the executors preferred a petition of right claiming payment back of the duties paid in respect

(1) [1914] A. C. 176.

of the properties that were situate outside the Province, and also further sums representing the higher rate at which property within the Province had been taxed by reason of its being aggregated with that outside. The petition was part heard by the Superior Court on July 20, 1911, but it was ordered that the proceedings should be suspended until the decision of the Supreme Court of Canada on the appeal taken from the decision in the case of *Cotton* v. *The King*. (1) The case of *Cotton* v. *The King* (1) ultimately came before the Board, who, on November 11, 1913, decided against the Crown. Burland's case then came again before the Superior Court on June 26, 1914, when the petition was dismissed, and on appeal to the Court of King's Bench this judgment was affirmed, Cross and Pelletier JJ. dissenting from the other judges. The appeal in Burland's case is brought from that decision.

With regard to the other appeal, which will be referred to as Sharple's appeal, it relates to the property of the Hon. J. Sharple, who died on July 30, 1913, also domiciled in Quebec; he appointed the appellant, Dame Margaret Alleyn Sharple, his universal legatee and executrix of his will jointly with the other two appellants.

On October 15, 1913, the executors lodged their declaration, enumerating the property of the deceased, and including therein shares in various companies whose head offices were outside the Province of Quebec. A claim was made on May 26, 1915, for duties in respect of the whole estate similar to the claim that was made in the case of Burland. These claims, so far as they related to the property outside the Province, were resisted and proceedings were instituted on August 12, 1915, by the respondent as Collector of the Revenue against the executors to recover payment. Lemieux C.J., by whom the action was tried in the Supreme Court, decided against the appellants, who appealed to the Court of King's Bench, and that Court by a majority of three to two decided in the appellants' favour. The respondent then appealed to the Supreme Court of Canada, who on February 3, 1920,

(1) [1914] A. C. 176.

unanimously decided against the appellants, and from their judgment this second appeal has been brought.

In order that the narrative of facts may be perfectly clear, their Lordships have hitherto avoided consideration of the statutes under which the taxes were claimed, and these must now be examined in detail. Though, as will be seen, different considerations apply to the two cases, owing to the difference in the relevant dates, yet the defence of the appellants is in each case identical, and is that the taxing statutes under which the money is claimed are ultra vires of the Provincial government.

So far as the Burland appeal is concerned, the relevant statute is that of 6 Edw. 7, c. 11, amended by 7 Edw. 7, c. 14. Art. 1191*b*, enacted by s. 1 of the former statute, provides that: "All transmissions, owing to death, of the property in, or the usufruct or enjoyment of, movable and immovable property in the Province, shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death," and by art. 1191*c* the word "property" is defined as follows: "The word 'property,' within the meaning of this section, shall include all property, whether movable or immovable, actually situate or owing within the Province, whether the deceased at the time of his death had his domicil within or without the Province, or whether the debt is payable within or without the Province, or whether the transmission takes place within or without the Province, and all movables, wherever situate, of persons having their domicil, or residing, in the Province of Quebec at the time of their death."

By 7 Edw. 7, c. 14, assented to on March 14, 1907, art. 1191*b* was amended by replacing the words "in the province" by the words "as defined in art. 1191*c*."

The first only of these two statutes was applicable in the case of *Cotton* v. *The King* (1), for Henry Cotton, whose estate was the subject of the dispute, had died on December 26, 1906, domiciled in Montreal, and the question raised was whether or no the property outside the Province was liable to the tax imposed by the statute 6 Edw. 7, c. 11. It was decided that the property was not so liable for two distinct reasons—the one that art. 1191*b*, s. 1, 6 Edw. 7, c. 11, was the real taxing section, and imposed duties upon movable property "In the Province"—the extended meaning given to the word "property" in art. 1191*c*, being held by the Board to be insufficient to bring property outside the Province within the operation of the tax expressly imposed by the earlier section on property within the Province. Had the decision rested only on this ground, it would have provided little help towards reaching a right conclusion in the Burland appeal, as the subsequent statute 7 Edw. 7, c. 14, struck at the root of this part of the decision by deliberately incorporating the definition in the taxing articles. But there was a further and wholly independent ground of decision, and that was that by art. 1191*g*, the tax might be payable in the first instance by a class of persons, who recouped themselves for the payment from the legatees; and, therefore, in accordance with a distinction between direct and indirect taxation traceable to a definition given by John Stuart Mill, and acted upon by the Board in the cases of *Att.-Gen. for Quebec* v. *Reed* (1); *Bank of Toronto* v. *Lambe* (2); and *Brewers' and Maltsters' Association of Ontario* v. *Att.-Gen. for Ontario* (3), the taxation was held to be indirect and outside the power of the Province.

---

(1) [1914] A. C. 176.

In the course of the judgment of the Board it was stated that the provisions of the statute entitled the collector of inland revenue "to collect the whole of the duties on the estate from the person making the declaration, who may (and, as we understand, in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate, or, more accurately, from the person interested therein." Now the statute though mentioning the notary exempts him from obligation to transmit the declaration, and consequently from the liability to pay, which by s. 3 is imposed on the declarant;

---

(1) (1884) 10 App. Cas. 141.
(2) (1887) 12 App. Cas. 575.
(3) [1897] A. C. 231.

J. C.
1921
BURLAND
v.
THE KING.
ALLEYN
v.
BARTHE.

but it appears from the report that their Lordships were informed that in point of practice the notary frequently did make the declaration himself, and so bring himself within the provisions of the statute. It is now stated that this information was not accurate and that it is not a common practice for the notary to make the declaration, if indeed he ever makes it; and so, the illustration drawn from the case of the notary cannot be taken to have been a reliable one. But the principle remains the same and could equally well have been illustrated by the cases of the executor, or administrator, or legatee by a particular title. The error does not affect the force of the decision, though their Lordships have thought it right to make this explanation, as it has evidently given rise to misunderstanding in the Province.

Unless, therefore, the case can be distinguished, it completely covers the Burland appeal. The respondent tries to escape down two avenues of reasoning; the one that the point was not necessary for the decision in *Cotton's Case* (1), which had already been determined by other independent considerations, and the other that subsequent legislation made retrospective removes the protection which *Cotton's Case* (1) affords. As to the first, the road is not open. The decision that the statute was ultra vires was in no sense a wayside dictum; it was just as complete and fundamental as the decision that bore on the construction of the statute; the words used in the judgment itself make this clear. After stating the nature of the two questions, it continues in these words (2): "These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other."

As to the second, the position is less clear. Legislation followed swiftly upon the decision of *Cotton* v. *The King* (1), and three statutes, 4 Geo. 5, c. 9, 4 Geo. 5, c. 10, and 4 Geo. 5,

(1) [1914] A. C. 176.

(2) Ibid. 187.

J. C.
1921
BURLAND
v.
THE KING.
ALLEYN
v.
BARTHE.

c. 11, received the Royal assent on February 19, 1914. They will need examination in Sharple's appeal, but so far as the Burland appeal is concerned the critical statute is 4 Geo. 5, c. 11, as in each of the other two statutes there is a provision that, so far as regards property transmitted before the passing of the statute, they only apply where the taxes previously imposed remained unpaid. The statute 4 Geo. 5, c. 11, after reference to the mistake in the case of *Cotton* v. *The King* (1), and a series of recitals which make it obvious that the purpose of the Act is as far as possible to remedy the provisions of former statutes which had led to the decision and to prevent the inequalities which might arise as between those who had paid and those who had not paid the taxes declared by *Cotton's Case* (1) to be unlawfully imposed, enacted that: "The intent and meaning of all the acts of the Legislature imposing succession duties, was and is, that every person to whom property or any interest therein was transmitted owing to death, should pay to the Government direct, and without having a recourse against any other person, a tax calculated upon the value of the property so transferred": and after a provision to prevent action for recovery of taxes paid on the ground that such taxes were not direct provided by s. 3 that: "This Act shall not apply to pending or decided cases."

The question, therefore, is whether Burland's case was a "pending case" within the meaning of s. 3. Lemieux C.J. regarded the point as closed to the appellants, as they had in fact paid taxes on the property within the Province, and did not ask for their repayment. In his words: "Les pétitionnaires n'ont, en aucune manière, directement ou indirectement, soutenu que la taxe était illégale, parce que cette taxe était indirecte, c.-à-d., contraire à l'acte constitutionnel qui ne permet aux législatures de n'imposer que des taxes directes. Au contraire, la succession Burland admet aussi formellement que possible que la taxe est directe et valable, car elle a payé pour taxes sur les biens dans la province la somme de $71,522.65 dont elle ne demande pas la répétition,"

---

(1) [1914] A. C. 176.

J. C.
1921
BURLAND
v.
THE KING.
ALLEYN
v.
BARTHE.

and again: " Si la question de la taxe directe n'est pas contestée, mais au contraire admise, le tribunal n'a guère à faire de s'occuper de cette question."

It is undoubtedly the fact that the appellants in Burland's appeal did not raise in express terms the ground of the taxation being indirect and base their relief on this contention, but they stated that the Government had no right to charge taxes on property outside the Province, and that the laws and statutes which authorized the Government to raise such taxes were ultra vires and of no effect. This was the exact position in the case of *Cotton* v. *The King* (1); there also the claim was only for repayment of the taxes on the extra territorial property, and the claim was in similar words, but the fact that the authority to pass the law was challenged, though only associated with a limited relief and a special cause, was regarded as sufficient to compel the Board to consider the question of ultra vires in its widest application and not to bind themselves to consider only the one assigned reason of invalidity. According to the rules of pleading, an allegation of infirmity in any statute on the ground of ultra vires is sufficient without assigning further reasons.

Their Lordships cannot, therefore, agree with Lemieux C.J., and equally they differ from Archambeault C.J., Lavergne J., and Carroll J. The first of these learned judges bases his judgment, not indeed on the ground of admission of liability, but on that of defect in the pleadings. He says: " La cause actuelle était pendante lorsque la loi a été passée. Comme je le disais dans la cause *Oliver* v. *Jolin* (2), la loi de 1914 a eu pour objet d'interpréter les lois antérieures sur les taxes de succession, et de déclarer que ces taxes étaient directes et non indirectes. L'article 3 ne doit, en conséquence, s'appliquer qu'aux seules causes où cette question a été expressément soulevée. Dans la cause actuelle, les appelants ont obtenu de la couronne une pétition de droit ou la question n'est aucunement invoquée," and Carroll J. appears to regard the reservation as inoperative, and no reasons were filed by Lavergne J. Pelletier J., who differed, does not deal with the effect of the statute 4 Geo. 5, c. 11, and Cross J., the other learned judge who dissented, assigned no reasons.

---

(1) [1914] A. C. 176.

(2) (1916) Q. R. 25 K. B. 537.

Their Lordships think that Burland's case was a pending case within the meaning of s. 3. It was a case in which the claim for repayment was being made and the validity of the statute was in issue.

This being so the case cannot be distinguished from *Cotton* v. *The King* (1), and the appeal must be allowed, and the judgments of the two Courts below set aside and judgment entered for the appellants with costs here and in those Courts, and they will so humbly advise His Majesty.

Turning now to Sharple's appeal, different considerations and different statutes are involved.

Proceedings there commenced on August 12, 1915, and they were, therefore, not pending when 4 Geo. 5, c. 11, became operative, and it becomes necessary to examine the effect of that and the preceding statutes.

4 Geo. 5, c. 9, provides by art. 1375, that all property movable or immovable, the ownership, usufruct or enjoyment whereof, is transmitted owing to death, shall be liable to certain taxes calculated upon the value of the transmitted property. Art. 1376 says that the word " property " included all property movable or immovable actually situate within the Province, and that whether the deceased was domiciled within or without, or the transmission took place within or without; an exemption was given by art. 1380 to a notary, executor, trustee or administrator from personal liability for the duties imposed, This, as will be seen, does not affect movable property outside the Province, and of course does not touch the property in the present instance; but by 4 Geo. 5, c. 10, it is expressly provided by art. 1387*b* that: " All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned," and by art. 1387*g*, it is provided that the person to whom as

---

(1) [1914] A. C. 176.

heir, universal legatee, legatee by general or particular title, or donee under a gift in contemplation of death, movable property outside the Province is transmitted, is personally liable for the duties in respect of such properties, and no more; and it concludes: "No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails so to do may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

These statutes have effectively met the difficulty which was pointed out in the case of *Cotton* v. *The King* (1) as to the taxation imposed by the earlier statutes being indirect, and it only remains to be considered whether the taxation is within the Province. For this purpose 4 Geo. 5, c. 10, is the relevant statute. The conditions there stated upon which taxation attaches to property outside the Province are two: (1.) That the transmission must be within the Province; and (2.) That it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words "within the Province" which modify and limit the word "transmission." So regarded the taxation is clearly within the powers of the Province. It is, however, pointed out that art. 1387*g* refers to "every person" to whom movable property outside the Province is transmitted as liable for the duty, but this must refer to every person on whom the duties are imposed, and those persons are, as has already been shown, persons within the Province.

On this construction the statute is clearly within the powers conferred by the British North America Act, 1867, and the taxes in dispute were rightly claimed. Their Lordships, therefore, are of opinion that this appeal should fail, and they will humbly advise His Majesty that it should be dismissed with costs.

---

(1) [1914] A. C. 176.

Solicitors for appellants : *Holmes, Son, & Pott ; Stephenson, Harwood & Tatham.*

Solicitors for respondents : *Charles Russell & Co.*

[PRIVY COUNCIL.]

THE NEW SWEDEN.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

J. C.*
1921
Dec. 6.

Prize Court—Damage to Goods—Reprisals Order in Council of March 11, 1915—*Delay in placing Goods in Custody of Marshal—Liability for Damage.*

The well-settled rule of prize that captors are not liable for damage to goods seized unless it results from their unreasonable action, negligence, or wilful wrongdoing, and are not under an obligation to insure, applies to goods the discharge of which at a British port has been required under the Order in Council of March 11, 1915. If goods so discharged have not been placed in the custody of the marshal at once, there being reasonable grounds for the delay, and in the interval are damaged by fire without negligence, the owners are not entitled to recover for the loss so caused, although the goods would have been covered against fire by a floating policy had they been in the custody of the marshal when the fire occurred.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) delivered on July 29, 1921. (1)

The appellants, an American firm, had moved the Prize Court for damages in respect of the loss suffered by them owing to damage by fire to their goods which were discharged at Kirkwall under the Reprisals Order in Council of March 11, 1915, and had subsequently been ordered by the Prize Court

---

* *Present :* LORD SUMNER, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1921] P. 473.

J. C.
1921
THE NEW SWEDEN.

to be sold as being of enemy origin. The facts appear from the judgment of the Judicial Committee.

The President (Sir Henry Duke) had dismissed the application.

1921. Nov. 7, 8. *Raeburn K.C.* and *W. Price* for the appellants.

Hon. Geoffrey Lawrence (*Sir Gordon Hewart A.-G.* with him) for the respondent, the Procurator-General. The arguments sufficiently appear from the judgment.

Dec. 6. The judgment of their Lordships was delivered by

LORD SUMNER. On May 16, 1916, the steamship *New Sweden*, a Swedish vessel outward bound from Christiania to Newport News, put into Kirkwall by her owners' orders and delivered to the Surveyor of Customs there 157 bags containing postal packages. This was done in pursuance of the Reprisals Order in Council of March 11, 1915. According to the practice in force, these bags were placed in the hands of the postal authorities in the same condition in which they were received and were despatched by rail to London, in order that they might be searched there for goods which were of enemy origin, or were otherwise liable to be detained under the Order. Such a search at Kirkwall would have been impracticable.

By some accident, unexplained and probably inexplicable, the van containing these bags took fire while the train was passing through Perthshire. Ninety-five bags were destroyed altogether and only sixty-two reached London intact, but seven more were salved in a damaged condition. The mailbags had contained 301 parcels of leather gloves of German manufacture, which belonged to neutral owners, the appellants, but only 113 reached London. Upon examination of the bags there these parcels were discovered and were formally seized on June 9, 1916, by the Surveyor of Customs, who placed them in the custody of the marshal of the Prize Court. By decree, dated November 12, 1917, they were pronounced to be of enemy origin and ordered to be sold. The net proceeds—1073*l.* 17*s.* 3*d.*—were ordered to be released to the appellants' solicitors by consent of the Procurator-General on May 6, 1921, and thereafter the appellants moved for an order that the Procurator-General should pay them damages for the gloves lost. The President dismissed this motion and the present appeal was then brought.

Persons who claim the release of goods in prize or of money lodged in Court to represent them may charge the Procurator-General, in virtue of his office, as the person liable to answer for the shortcomings either of officials who have dealt with the goods before they were placed in the custody of the marshal, or of the marshal himself. It is plain that it was no part of the duty of those who brought the *New Sweden* in or received what she discharged, to place goods in the custody of the Prize Court which were neither enemy goods nor goods of enemy origin. Equally little was it the function of the marshal to take charge of such goods. Before any delivery could be made to him examination and discrimination were indispensable, and the case must therefore be considered both in regard to events happening before the seizure and in regard to those happening after it. As no actual neglect or default is alleged in connection with the way in which the goods were dealt with, the appellants' contention is either that some or all of these officials stand towards the owners of the goods in the position of insurers and are answerable for their safety and ultimate return in all events, or that they were under some obligation towards the appellants to effect policies of insurance for their benefit.

There has been from time to time some difference of opinion as to the exact degree of care which is required of captors, but their obligation has always been recognized as being one of care and prudence. It has never been placed so high as that of insuring or answering in all events for the safety of the prize, whether by protecting it from all hazard or by providing through policies of insurance a fund to make good its loss. The law is now well settled that it is for unreasonable action, for negligence and for wilful wrongdoing, that captors are liable from the time of seizure to the time when the res is placed in the custody of the Prize Court. If the obligation went beyond that of reasonable care and abstention from wilful wrong, most of the discussions and decisions on this subject would have been wholly beside the mark. There is neither principle nor authority for placing the responsibility of those who exercise a lawful right of search, or who act in accordance with the terms of a Reprisals Order, any higher than that of actual captors. On the other hand, insurance of the owners' interest is clearly a matter for the owners themselves. In this particular case the length of time elapsing between the Order in Council and the shipment in question raises the presumption that the owners were fully alive to the possibility and even the probability that the *New Sweden* would put into Kirkwall and that the goods, after being removed from the ship, would be despatched to London. It may be that they actually insured against the risks thereby incurred: it certainly does not appear that such an insurance was impracticable.

Their Lordships have already declared their opinion that "there is no obligation on the part of the Crown or its executive officers or the Prize Court marshal to effect insurances against fire for the benefit of cargo-owners, whether the cargo be landed or kept on board a captured ship (*The Südmark No.* 2 (1); *The Cairnsmore* (2)), though in general the marshal does insure goods in his custody. As against claimants, to whom goods which might have been condemned are in fact released, the premiums are not charged on them in ordinary circumstances. Where, however, the goods are detained only and cannot be condemned, it has been held (*The United States* (3)) that the premiums constitute an expense, which the goods must bear. On this principle a small sum was deducted for insurance in the present case in arriving at the net proceeds. Their Lordships do not understand this deduction to be challenged, but only to be used as an argument that the goods should have been insured at an earlier stage—namely, during the railway journey,

---

(1) [1918] A. C. 475, 484.

(2) [1921] 1 A. C. 439, 441.

(3) [1920] P. 430.

J. C.
1921
THE NEW SWEDEN.

when, as it proved, they ran some risk. As far as the marshal is concerned, however, the point does not arise, for the fire took place before the bags were formally seized or were placed in his custody at all, and he could not be bound to insure goods which had not been seized, or liable for more than the goods which were delivered to him or their proceeds. The appellants' attempt to find some duty in the officers, who bring in and examine the goods, to accelerate the date of their delivery to the marshal, in order that any policy kept afoot by him might attach and protect them at the earliest possible moment, is one not supported by any authority. It is true that, as their Lordships were informed, the President stated that he had it on high authority, apparently that of the marshal himself, that the surveyor of customs at Kirkwall was one of his deputies, but not only is there no evidence that in taking possession of the bags and forwarding them that official was acting as such deputy, but the facts that he was then acting only in furtherance of a right of examination and search and that the delivery to the marshal's custody is stated to have taken place in London after the fire, are conclusive that he was not. The loss therefore occurred before the functions of the marshal had begun.

The appellants finally rested their case on the terms expressed in, or to be implied from, the Order in Council itself. Its validity has already been the subject of decision by their Lordships, and it was not suggested that transmission of the mailbags to London for examination inflicted unreasonable or unnecessary risk or loss upon neutrals. In fact, examination in London is probably as much in favour of the security of the owners as it is of the efficiency of the examination in the interests of the belligerent. It is argued that the whole scheme of the Order is to provide for temporary detention only, which implies final restoration, and that the Order, being in itself an interference with neutral property, not warranted by ordinary rights of capture but dependent on abnormal circumstances which gave rise to a right of reprisal, nothing can be held to be authorized to the prejudice of the neutral beyond that which the Order expressly

J. C.
1921
THE NEW SWEDEN.

sanctions. This is applied in two ways. The marshal's duty, it is said, is to be in a position, quacunque via, to restore when detention ends, and to restore in value, if not in specie; and the duty of those who act before his custody begins is to put him in a position to discharge this duty—that is, to deliver to him, at all events, all the goods brought in, so that he may thereafter be in a position to detain and to restore them. Both duties must be derived from the Order in Council.

It is true that the Order in Council provides for detention, and that in no event is condemnation in question, though it is contemplated that the ownership in the goods may be divested, since this is the result of sale, but the terms of the Order are precise and unambiguous, and no extension of them by implication is involved in the deductions which their Lordships propose to make from them. Detention no doubt implies ultimate restoration, but restoration of what? As the Order expressly provides for sale of the chattels detained, the restoration is not necessarily or commonly restoration in specie. What is to be restored is the net cash proceeds. The Order requires that the goods in question "shall be placed in the custody of the marshal of the Prize Court, and if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just." Since nothing further is directed, the Court can but apply the same principles as it is accustomed and bound to apply in matters of prize, and there is a special provision that the ordinary practice and procedure of the Prize Court is to be followed, mutatis mutandis. This provision, art. 5 (2.), is not exclusive of all other resort to the principles of prize law, but is inclusive of practice and procedure, such as they may be when the Order is put into force. It follows that if the Court makes an order, just in itself, with regard to the disposal of such net proceeds as the marshal has in his hands, so as to discharge him in accordance with its ordinary principles, and refuses to hold liable either its own officers or the officials who detain, forward and search the parcels mail prior to the seizure in prize of the goods in question, no default having been proved against them, it is strictly adhering to the terms and sense of the Order in Council, and if neutral rights of property suffer, that result can be justified under the terms of the Order of March 11, 1915.

For these reasons their Lordships think that the order appealed from was right, and that the appeal ought to be dismissed with costs, and so they will humbly advise His Majesty.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitor for respondent: *Treasury Solicitor.*

[PRIVY COUNCIL.]

THE ANICHAB AND OTHER VESSELS AND CRAFT.

J. C.*
1921
Dec. 13.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Enemy Property—Subjects of Maritime Prize—Lighters and Craft seized on Land—Absence of Pursuit.

About six months after the military forces of the Crown had occupied certain ports in German South-West Africa, German owned vessels and craft were seized at two places which were respectively 148 and 310 miles inland. The vessels and craft had been sent by rail to those places from the ports by the owners, under the authority of a German officer, in order to prevent them falling into the hands of the British forces:—

Held, that the vessels and craft not being taken in pursuit were not the subject of maritime prize.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the Admiralty Division (in Prize) (1) dated July 31, 1919.

The appeal was by the Procurator-General from a judgment of the President (Lord Sterndale) refusing to condemn as prize

---

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) [1919] P. 329.

J. C.
1921
THE ANICHAB, ETC.

certain vessels and craft seized in June and July, 1915, at certain inland places in German South-West Africa. The facts of the case appear from the judgment of the Judicial Committee, and more fully from the judgment of the President. (1)

1921. Oct. 27. *Wylie* (*Sir Gordon Hewart A.-G.* with him) for the appellant, the Procurator-General, referred to *Lindo* v. *Rodney* (2) and *The Roumanian.* (3)

The respondents, the Woermann Linie A. G., did not appear.

Dec. 13. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal against the decree of the Prize Court releasing certain craft—namely, sixteen lighters, and one launch and certain rope fenders, the property of the respondents, captured at Otavi and Omaruru, then in German South-West Africa, by His Majesty's military forces. No case was presented on behalf of the respondents, and the appeal of His Majesty's Procurator-General was heard ex parte.

The question to be decided on the appeal is whether at the time of their capture the said craft had ceased to be the subject of maritime prize, and were private property seized on land by His Majesty's military forces. His Majesty's military forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Luderitzbucht (Luderitz Bay) on September 19, 1914, and Swakopmund on January 14, 1915. A number of vessels, craft, and accessories seized at Luderitzbucht and Swakopmund were condemned by the learned President as good and lawful prize, and against this decision there is no appeal. The learned President has found in accordance with the evidence of Sir Oswyn Murray that the craft in question in this appeal were found and seized, partly at Omaruru, 148 miles inland, when Omaruru was occupied on June 20,

---

(1) [1919] P. 329.

(2) (1781) 2 Doug. 612n.

(3) [1916] 1 A. C. 124, 137.

1915, and partly at Otavi, 310 miles inland, when Otavi was occupied on July 1, 1915. There are no rivers in South-West Africa on which the said craft could have been or were intended to be used, and they had been dispatched up the railway line at the request of the respondents, under the authority of a German officer, in order to prevent them falling into the hands of the British forces. It is not disputed that they were property the subject of maritime prize at the declaration of the war, and at that time liable to seizure. The craft were first taken on rail to Richtofen, 12½ miles inland, during August and September, 1914, and were then taken by rail to Usakos, 94 miles inland, during October, 1914, where they remained till March, 1915. They were forwarded to Omaruru and Otavi during April, 1915, and were left standing on rail near the railway stations. There is no doubt but that they were intended to be returned to the coast for naval use.

Sir Oswyn Murray, Secretary to the Admiralty, states in his affidavit that His Majesty's forces, operating under the Government of the Union of South Africa, in German South-West Africa, occupied Luderitzbucht and Swakopmund at the dates above mentioned, and that in the course of their operations the said forces occupied the northern section of the railway lines from Swakopmund to Otavi, and found and seized the lighters and craft in question at the dates mentioned. The learned President has found that there was no evidence before him that the forces in South Africa were "getting on as fast as they could after this craft to try and get them," and that it is just as consistent on the evidence before him that the first operations might have ceased for a time, and a new operation have begun. He states: "All I know is, that after the first taking possession of the ports there is an interval of about six months, and then these craft are taken at places respectively 150 and 300 miles up the country, and are taken on land by the military forces. It does not seem to me in those circumstances that they are the subject of maritime prize."

Their Lordships see no reason for not accepting the findings

J. C.
1921
THE ANICHAB, ETC.

of fact on which the learned President based his decision, but two points were raised on behalf of the appellant. In the first place it was argued that the craft had not ceased to be liable to capture as maritime prize, when they had only been removed inland in order to escape pursuit at the time when other craft of a similar character were seized at Luderitzbucht and Swakopmund. It is no doubt accurate to say that property, the subject of maritime prize at the outbreak of war, may be lawfully seized as maritime prize in certain circumstances, although the actual seizure takes place on land. It was held by their Lordships in the case of *The Roumanian* (1) that the test of ashore or afloat was no infallible test as to whether goods could or could not be seized as maritime prize, and that it was perfectly clear that enemy goods for instance, seized on enemy territory by the naval forces of the Crown, might lawfully be condemned as prize. It was held that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable, merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Co., Ld., for safe custody, and that its seizure there as prize was lawful. The fact, therefore, that in the present case the craft were not captured until after they had been carried inland, is not conclusive against the case of the appellant; but the learned President has found that there was no evidence before him that after the enemy had succeeded "in getting ashore and running away with his property," the belligerent who was trying to capture it did pursue and take the craft in the course of such pursuit, and that in this respect the facts of the present case did not come within the principle accepted by their Lordships in *The Roumanian.* (1) The learned President further held that the capture should be regarded as a capture of property on land by the military forces of the Crown. The capture of property on land by military forces under these conditions would not subject such property

---

(1) [1916] 1 A. C. 124.

J. C.
1921

THE ANICHAB, ETC.

to condemnation as maritime prize, and, as already stated, their Lordships see no reason for differing from the learned President in his conclusion of fact.

In the second place the appellant argued that the craft were the subject of maritime prize, on the ground that when they came into possession of their lawful owners they would be applied again to naval purposes. If the property is to be regarded as property on land, seized by the military forces of the Crown, it is not material that it might subsequently be used under conditions, which would subject it, if so used, to condemnation as maritime prize. It is not necessary, in the opinion of their Lordships, to refer to art. 53 of the 4th Convention of the Hague, 1907, or to go further than to say that in their opinion the learned President was right in his decision that the craft were not subject to condemnation as maritime prize.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared, there will be no order as to costs.

Solicitor for appellant: *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C.*
1921
Dec. 19.

UNION BANK OF AUSTRALIA, LIMITED APPELLANTS;

AND

McCLINTOCK AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Bankers—Conversion of Drafts—Ratification—Approbating and Reprobating.

The respondents' manager, without their authority and fraudulently, obtained from their bankers, in exchange for cheques drawn by the respondents upon the bankers, drafts for equivalent amounts drawn by the bankers upon themselves, payable to bearer, and crossed "not negotiable." These drafts the manager paid to an account which he had with the appellants, and they collected the amounts. The respondents sued the appellants for damages for conversion of the drafts:—

Held, that the action failed, since the respondents could not ratify the act of their manager in obtaining the drafts, so as to have a title to sue, without also ratifying his subsequent dealing with the drafts, the form of which made collection through a bank necessary.

Judgment of the Supreme Court reversed.

APPEAL from a judgment (August 11, 1920) of the Full Court of the Supreme Court of New South Wales, reversing a judgment of Cullen C.J. in an action tried with a special jury.

The respondents brought an action against the appellants claiming damages for the conversion of certain cheques, or alternatively to recover the proceeds of the cheques as money had and received. The facts of the case are stated in the judgment of their Lordships.

The action was tried by Cullen C.J. with a special jury. The jury having returned a general verdict for the defendants, the present appellants, judgment was entered accordingly. On an appeal to the Full Court the judgment at the trial was set aside, and judgment entered for the plaintiffs. The appeal to the Full Court is reported at 20 S. R. (N. S. W.) 498.

---

* *Present:* LORD ATKINSON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD PHILLIMORE.

1921. Nov. 11, 14, 15. *Hogg K.C.* and *T. Mathew* for the appellants. The verdict of the jury disentitled the Full Court from deciding against the appellants as to the cheque for 415*l.* The jury found either that the indorsement was valid, or that the proceeds had been duly applied. With regard to the drafts by the bankers upon themselves, referred to as "bank cheques," the appellants as holders had the right under s. 10, sub-s. 2, of the Commonwealth Bills of Exchange Act, 1909, to treat them either as bills of exchange or promissory notes. The evidence showed that according to the usage of bankers they were treated as cheques. The appellants were therefore entitled to the protection given by s. 88 to bankers who collect a crossed cheque for a customer. If that contention fails, the appellants say that the respondents could not ratify their manager's act in obtaining the drafts, so as to have a title to support the action, without also ratifying his handing them to the appellants for collection. Further, there was no ratification until the action was brought, and ratification must be subject to the dealings with the proceeds by the appellants as the manager's bankers. [Reference was made to *Capital and Counties Bank* v. *Gordon* (1); *Ross* v. *London County, &c., Bank* (2); and *Akrokerri Mines* v. *Economic Bank.* (3)]

R. A. Wright K.C. and *W. Barton* for the respondents. The indorsement of the cheque for 415*l.* was a forgery, the appellants therefore could have no rights in it. There was no evidence to support the verdict as to that cheque. Apart from ratification the property in the "bank cheques" at the date of the conversion was not in the manager: *Cundy* v. *Lindsay* (4); but in the respondents: *Taylor* v. *Plumer.* (5) It was within the scope of the manager's authority to obtain the drafts, although he was misusing his authority: *Hambro* v. *Burnand* (6); *Lloyd* v. *Groer, Smith & Co.* (7) But in any case the respondents became owners by ratifying the

(1) [1903] A. C. 240.
(2) [1919] 1 K. B. 678.
(3) [1904] 2 K. B. 465.
(4) (1878) 3 App. Cas. 459, 467.
(5) (1815) 3 M. & S. 562.
(6) [1904] 2 K. B. 10.
(7) [1912] A. C. 716.

J. C.
1921
UNION BANK OF AUSTRALIA
v.
McCLINTOCK.

obtaining of the drafts. The ratification did not extend to the subsequent dealings with the drafts. The respondents ratified only those acts which purported to be done on their behalf; they could not in law ratify any further act: *Keighley, Maxsted & Co.* v. *Durant.* (1) There is no case of estoppel against the respondents: *Farquharson & Co.* v. *King & Co.* (2) The appellants are not protected by s. 88 of the Commonwealth Bills of Exchange Act. The drafts were not cheques within the definition in s. 2, or under s. 66. Sect. 10 cannot be read with s. 88. Similarly under the English Act, s. 25 cannot be read with s. 82 (which section corresponds with s. 88 of the Commonwealth Act): *Morison* v. *London County, &c., Bank.* (3) The holder's power under s. 10 is merely to treat the instrument as a cheque as against persons liable upon it: see per Bowen L.J. in *Vagliano Brothers* v. *Bank of England.* (4) [Reference was also made to *Capital and Counties Bank* v. *Gordon* (5); *Miller* v. *Thomson* (6); *Lee* v. *Zagury* (7); *In re Tiedemann & Ledermann Frères.* (8)

T. Mathew in reply. In *Gordon's Case* (5) the bank was not the holder but the payee; it was pointed out that if the bank had been holders different considerations might have applied.

Dec. 19. The judgment of their Lordships was delivered by

LORD SUMNER. This appeal relates to sixteen drafts of a total value of over 16,000*l.*, which one McClintock misappropriated in fraud of the respondents, the plaintiffs in the action. The appellants are a bank, with which McClintock kept an account of his own in the name of Robert Haynes, and as the drafts were paid by him into and collected for him through this account, the bank became the unwitting and innocent instrument of his fraud. The plaintiffs sued in conversion, or alternatively, the tort being waived, for the proceeds of the drafts as money had and received to their use. The

---

(1) [1901] A. C. 240.
(2) [1902] A. C. 325.
(3) [1914] 3 K. B. 356.
(4) (1889) 23 Q. B. D. 243, 261.
(5) [1903] A. C. 240.
(6) (1841) 3 M. & G. 576.
(7) (1817) 8 Taunt. 114.
(8) [1899] 2 Q. B. 66.

J. C.
1921

UNION
BANK OF
AUSTRALIA
v.
MCCLINTOCK.

jury returned a general verdict for the defendants and judgment was entered for them accordingly, but on appeal the verdict and judgment were set aside and judgment was entered for the plaintiffs for 17,378*l.* 9*s.* 7*d.*, being the amount of the drafts with undisputed interest at the rate of 6 per cent.

McClintock was the plaintiffs' manager. The frauds began in October, 1916, shortly after his appointment, when he paid into his "Robert Haynes" account an open cheque for 415*l.* 3*s.* 11*d.* drawn by the respondents on their then bankers, the Commonwealth Bank of Australia, in favour of R. Haynes or order. In all the other cases the respondents' cheques on the Australian Bank of Commerce, at which they subsequently kept three accounts, were, at the instance of McClintock, exchanged for drafts (called "bank cheques") drawn by that bank upon itself for equivalent amounts, and these drafts McClintock then paid into his "Robert Haynes" account, through which the amounts of them were collected for him by the defendants. Of this series of fifteen bank cheques the second, drawn for the amount of 1000*l.*, was made payable to G. Tallis or order, and the respondents alleged that the indorsement "G. Tallis" was forged by McClintock, and that through it the appellants could derive no title or defence. The other bank cheques were all drawn in favour of R. Haynes, Robt. Haynes, Robert Haynes, or Robert Haynes, Esq. It is therefore necessary to consider separately the facts as to the cheque for 415*l.* 3*s.* 11*d.*; the bank cheque for 1000*l.* in favour of G. Tallis or order; and the remaining fourteen bank cheques, among which no distinctions were drawn.

With regard to the cheque for 415*l.* 13*s.* 11*d.* their Lordships affirmed the judgment of the Supreme Court, finding that a receipt produced and purporting to be signed by Haynes was "not evidence such as twelve reasonable men could rest any verdict upon, if indeed (with the signature unproved) it was evidence at all," that the proceeds of the cheque had been applied in discharge of the respondents' debt.

As to the bank cheque drawn in favour of G. Tallis or order, the facts are short. The plaintiffs called a witness, a Mr. Tonkin, who said that he knew a Mr. George Tallis and the indorsement was not in his writing, but that he did not know that there might not be other George Tallises or G. Tallises about. The counterfoil of the cheque, in exchange for which this bank cheque was issued, was filled up "Geo. Tallis instalment Russell Street property, due October 15, 1917, time extended till to-day," a statement of the purpose for which the cheque was drawn which, fully pursued, might have led to some identification of the payee of the cheque with the gentleman whom Mr. Tonkin knew. Their Lordships do not find in the record that this was done. The accountant to the trustees "knew of a Mr. George Tallis as having business with the trustees," but carried the matter no further. Mr. George Tallis may have been so well known in Sydney that it was not thought necessary to give evidence as to his business, but no assumption can be made on the subject. The matter was for the jury. It was for them to say whether they were satisfied that the indorsement "G. Tallis" on this bank cheque was a forgery, and their general verdict must be taken to mean that they were not.

There follows an important question, which is also one of fact, as to the actual authority given by the plaintiffs to McClintock. The business which the plaintiffs carried on, as trustees of the estate of John Norton, deceased, was that of publishing a newspaper in several States of the Commonwealth and in New Zealand. They were four in number. Two were ladies, one being McClintock's wife; one was a journalist resident in Queensland; the occupation and address of the remaining trustee are not stated. Mr. Perel, the Queensland trustee who was called, evidently knew little of the details of the business. According to him the trustees appointed McClintock "manager" in 1916, shortly after Mr. Norton's death. The plaintiffs' clerks said he was "general manager." No evidence was given as to the authority that is in fact customarily given to a manager of a newspaper business, and this authority is not matter of law. No doubt a manager manages, but how and under what restrictions must be proved. It was proved that one of McClintock's duties was to keep or be responsible for keeping the books of the business, but there was little else in evidence. From the beginning he was never authorized to draw on the trustees' bank account by himself; another signature, though not that of another trustee, was always required. In September, 1917, before the date of the earliest of the fifteen bank cheques, the trustees made a further arrangement—namely, that cheques on their accounts should not only bear a second signature—that of Mr. Marsh or Mr. Conolly—as well as McClintock's, but should be countersigned by Messrs. Starkey and Starkey, the firm of accountants who acted as their auditors, and these gentlemen had to be satisfied by McClintock (though to a considerable extent they took his word) as to the purpose for which cheques were drawn.

It is common in Australia for banks, when requested, to issue to customers "bank cheques," in form drawn by themselves on themselves, in favour of a named payee or order or bearer. Such cheques are convenient in transactions where a creditor for some reason prefers not to take his debtor's own cheque. McClintock, having obtained the second signature and the accountant's counter-signature to cheques drawn by himself in the name of the trustees on the Australian Bank of Commerce and made payable to that bank itself, used to send them to the bank indorsed with a request, signed by himself alone but on behalf of the estate of John Norton, for the issue of a bank cheque, which was always to be in favour of Haynes, except in the one case of the Tallis cheque. A bank cheque was accordingly returned in exchange. This McClintock, sometimes at once, sometimes a little later, paid into his Haynes account with the defendants, and so he got the money. How he concealed his depredations from the auditors for so long does not appear, nor does it matter. It is evident, however, that this procedure largely undid the instructions given in September, 1917, as to the form of the trustees' cheques, and McClintock might almost as well have been authorized to operate on the trustees' accounts by himself. So far as these items were concerned, all that was gained was that he had to impose on the vigilance of the accountants on each occasion by some plausible falsehood, and to make the procedure by which he ultimately purported to vouch the transaction, tally with the original lie. The plaintiffs sought to infer that his authority as general manager included the disposal at his own discretion of the proceeds of cheques, signed and countersigned with so much precaution, but in their Lordships' opinion the obvious construction, and certainly a reasonable construction, to put on the matter is that McClintock was no less audacious than dishonest, and resolutely took advantage of any unguarded loophole which he found in his employers' system of business. Their Lordships think that it would require positive and substantial evidence to show that in fact he had actual authority to obtain these bank cheques in exchange whenever he thought fit to do so.

Of evidence, however, there was remarkably little. It was proved that "there is a very large business done by means of bank cheques," but "the bulk of them are on solicitors' settlements and things of that sort, purchases of property and so on." Whatever effect this evidence might have in the case of the transaction with G. Tallis, if there ever was such a transaction, it does not apply to the other bank cheque transactions, as to which the counterfoils of the trustees' cheques only show that they purported to be in payment for paper or in reduction of an overdraft or for transfer to loan account. This evidence was used to show that, as in some cases it might be necessary—or at least common and advantageous—to obtain a bank cheque, it must be deemed to have been within a general manager's actual authority to do so whenever he thought proper. It is enough to say that it was for the jury, if they thought proper, not to accept either the contention or the grounds for it, and their Lordships think that their general verdict for the defendants shows that they negatived the plaintiffs' case on this issue—namely, that the bank cheques were theirs when their agent and manager obtained them, but were forthwith converted by the appellants. This case plainly was put to the jury both by counsel and by the trial judge, as a prior alternative to ratification, and the jury did not accept it. This being so, the respondents fail to establish any conversion of their property by the appellants bank, which can be treated independently of their dealings with McClintock as their customer.

The plaintiffs' next, and indeed their main ground was that in asking for the bank cheques McClintock purported to act for them, even though he had no authority to do so, and that if they failed in showing that the cheques were theirs from the time when they were issued, they were, at any rate, entitled to make the cheques their own retrospectively by ratification, and that by the writ and the claim for money had and received they had done so. It was, of course, not contested that the plaintiffs could not both approbate and reprobate—that is to say, that they could not ratify one part and refuse to adopt another part of anything that was really an integral whole—but the difficulty (which is one of fact) is to say what the whole is and what is only a part. The respondents claimed to ratify McClintock's proceedings in getting the bank cheques but to disown his paying them into his own account. Thus they stopped short before the cheques reached the bank, and made the bank's collection of them a proceeding unauthorized by themselves, as owners of them, so that as against themselves there was a conversion.

There can be no doubt that McClintock's whole train of action, beginning with his indorsing on the trustees' cheques a request for the issue of bank cheques for the same amount, and going on to his paying them into his own account with the appellants' bank, was the execution of a preconceived and fraudulent scheme to transfer his employers' money into his own pockets. This feature gives unity to the whole series of events, but it is not necessary to consider whether it also binds them together into one transaction, which must be wholly repudiated or adopted wholly, for the actual form of the transactions carries the matter considerably further. McClintock's requests did not indicate whether the bank cheque was to be a cheque to order or to bearer, but the cheques issued, apparently in accordance with the bank's custom and, at any rate, without objection by McClintock, were cheques to bearer and crossed "not negotiable." The only exception is the G. Tallis cheque, already dealt with. Unless the bank cheques, when obtained, were to be wholly fruitless and idle, it was necessary to pay them into some bank for collection, and although in truth they were passed into McClintock's own account for a fraudulent object, the proceeds so obtained might have been applied by him to the trustees' use had he been an honest man. It follows that the selection of his own bank account as the means of collecting the cheques instead of the bank account of the trustees was rather an incidental irregularity than a fresh departure, and when his action in obtaining each cheque has been covered by the respondents' subsequent authority since mandato priori æquiparatur, the authority covers both his action in obtaining the cheque and his action in collecting the proceeds, and both were done, however improperly, within the limits of the authority conferred by ratification, and were not beyond its limits altogether. It follows on the facts that the plaintiffs fail to prove a conversion by the defendants of cheques which they seek to make their own by ratification, for, if they ratify at all they ratify the bank's collection of the proceeds for account of McClintock, and if they do not ratify, nothing has been converted that ever belonged to them.

This conclusion, that in respect of the bank cheques no conversion is proved, makes it unnecessary to deal with the defences which the appellants raised at the trial under ss. 8, 10 and 88 of the Commonwealth Bills of Exchange Act, 1909, and their Lordships' Board desires not to be taken as expressing or as having formed any opinion upon these questions. The result on the whole is as follows: Except as to the first cheque the appeal succeeds; and, the amount of the first cheque being trivial relatively to the whole claim, the appellants should have the costs of this appeal, nor should they pay any of the costs of the motion to the Full Court, which is now appealed against. Accordingly the rule entered by the Full Court should be wholly set aside, and in lieu thereof it should be ordered that the verdict and judgment should be entered for the plaintiffs in the action for 370*l.* 3*s.* 11*d.*, being 415*l.* 3*s.* 11*d.* less 45*l.*, which remained in McClintock's account and had not been misapplied, together with interest at 6 per cent. on that amount from the date of the writ until to-day. The plaintiffs should have the costs of the issue as to the first cheque down to the conclusion of the trial, but otherwise the appellants should have the costs of the action and of the motion to the Full Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondents: *Whatley & Son.*

[PRIVY COUNCIL.]

J. C.*
1921
Dec. 20.

CANADA CEMENT COMPANY, LIMITED . . . APPELLANTS;

AND

LA VILLE DE MONTRÉAL EST . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Procedure—Right of Appeal—Circuit Court—Municipal Taxes—R. S. Q., 1909, *art.* 5755—10 *Geo.* 5 (*Queb.*), c. 79.

There is no appeal from a judgment of the Circuit Court for the District of Montreal sitting at Montreal in an action under art. 5755 of the Cities' and Towns' Act (R. S. Q., 1909) for the recovery of municipal taxes.

Judgment of the Court of King's Bench affirmed.

APPEAL from a judgment (April 26, 1921) of the Court of King's Bench for the Province of Quebec dismissing for want of jurisdiction an appeal from a judgment of the Circuit Court for the District of Montreal, sitting at Montreal.

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

The respondent city brought an action against the appellants to recover $60,253 in respect of municipal taxes. The action was brought in the Circuit Court of the district of Montreal under art. 5755 of R. S. Q., 1909 (The Cities' and Towns' Act), and judgment was recovered. The appellants entered an appeal to the Court of King's Bench (Appeal Side) for the Province of Quebec, and the respondent city moved to dismiss the appeal for want of jurisdiction.

By a judgment delivered on April 26, 1921, the Appeal Side (Flynn, Allard and Tellier JJ.; Martin and Howard JJ. dissenting) allowed the motion, holding that the judgment of the Circuit Court was final and not susceptible of appeal. The present appeal was from that judgment. The respondent had petitioned the Judicial Committee to quash the appeal as incompetent; that petition was ordered to stand over till the hearing of the appeal.

1921. Nov. 21, 22. *Atwater K.C.* and *Hon. Geoffrey Lawrence* for the appellants. Under art. 52, cl. 3, of the Code of Civil Procedure there was a right of appeal from the Circuit Court sitting at Montreal to the Superior Court, sitting in review, where the amount exceeded $200 subject to the specific exceptions mentioned in the article. By 10 Geo. 5, c. 79 (Queb.), that right of appeal was transferred to the Court of King's Bench (Appeal Side).

Rinfort K.C. and *Perron* for the respondent city. The jurisdiction of the Circuit Court arose under the Cities' and Towns' Act, 1909, and as that Act does not provide for an appeal the judgment of the Court is final. The Act provides machinery whereby the valuation roll may be attacked, the scheme being that once the roll is finally settled, the taxes shall not be disputable. Secondly, there is upon the true construction of the Code of Civil Procedure no right of appeal from the Circuit Court sitting at the chef-lieu of the district. Thirdly, under 10 Geo. 5, c. 79, no appeal from the Circuit Court survives. [Reference was made to the following: *Ste. Cunégonde (Ville de)* v. *Gougeon* (1); *Dickey* v. *Thibault* (2);

---

(1) (1895) 25 Can. S. C. R. 78.

(2) (1898) Q. R. 13 S. C. 58.

Montreal City v. *St. Denis Land Co.* (1); *Ricard* v. *Grand' Mère* (*Ville de*) (2); *Grand' Mère* (*Ville de*) v. *Balcer* (3); *Brisebois* v. *Roxton Falls* (*Village of*) (4); *Lachance* v. *St. Anne de Beaupré* (*Ville de*) (5); *Senécal* v. *L'île Bizard* (*Corporation*) (6); *Noyes* v. *Cowansville* (*Village of*). (7)]

On the petition to quash the appeal it was contended that there was no right of appeal to the Privy Council under s. 68 of the Code of Civil Procedure, having regard to the nature of the case.

Atwater K.C. in reply. Under French and Canadian law there is a presumption in favour of the existence of a right of appeal: *Montreal City* v. *Brown.* (8)

Dec. 20. The judgment of their Lordships was delivered by

LORD BUCKMASTER. By art. 5755 of the Cities' and Towns' Act of Quebec, 1909, it is provided that: "The payment of municipal taxes may be claimed by an action brought in the name of the corporation, before the Magistrate's Court, or the Circuit Court for the county or district, or before the Mayor, or two or more councillors acting ex officio as justices of the peace, or before the Recorder's Court if there be one."

Their Lordships are unaware of any statutory definition of a Circuit Court for the county or district and none has been called to their attention; but they have been definitely informed that a Circuit Court for the district—or, as it is generally known, a District Court—is the Court sitting at the chief place in the county, and the other Courts are called the County Courts.

The respondents, who are the corporation for the town of Montreal East, availed themselves of the provision of the section above quoted and took proceedings against the appellants, the Canada Cement Co., in the Circuit Court, for the recovery of taxes which had been imposed upon them to the extent of $60,253. On January 5, 1921,

---

(1) (1913) Q. R. 22 K. B. 238.

(2) Ibid. 272.

(3) (1913) Q. R. 45 S. C. 109.

(4) (1897) 4 Rév. de Jur. 26.

(5) (1901) Q. R. 10 K. B. 223.

(6) (1900) 3 Queb. Prac. R. 389.

(7) (1906) 8 Queb. Prac. R. 426.

(8) (1876) 2 App. Cas. 168, 184.

Archambeault J., sitting in the Circuit Court, gave judgment for the respondents as against the appellants for the amount claimed. From this judgment the appellants appealed to the Court of King's Bench for the Province of Quebec, but on a motion made to dismiss the appeal for incompetency the Court held, by a majority of three judges to two, that the judgment of the Circuit Court was final and was not susceptible of appeal. From that judgment the present appeal has been brought.

The whole question that is raised is covered by determining whether or no the judgment of the Circuit Court at the chief place of its district was final. The respondents contend that it is, on three distinct grounds, the first being that, as the jurisdiction of the Circuit Court owed its origin to the Cities' and Towns' Act, 1909, all rights of appeal must be found in that statute, and none are thereby conferred. Their Lordships do not think that this contention is sound. The power that was given to take proceedings before the different Courts mentioned in art. 5755 enabled those proceedings to be taken as part of the ordinary business of the Courts mentioned, and the rights of appeal that exist from judgments given by those Courts are applicable to such proceedings. The case of the *National Telephone Co.* v. *Postmaster General* (1) is an illustration of this principle. The statement of Dorion J., in *Ville de Grand' Mère* v. *Balcer* (2), where he points out that there is a right of appeal under art. 5533 where penalties can be recovered in the civil Courts, is doubtless based upon this view, and their Lordships think it correct. The judgment of Lemieux C.J. in the same case, where he says that no appeal lies under art. 5755, does not appear necessarily to depend upon the absence of appeal provisions in the statute, but may be due to other considerations.

The second and by far the most important argument urged by the respondents is that the Circuit Court is created and governed by the provisions of the Code of Civil Procedure, and that in order to ascertain if any appeal exists in such a case as the present, it is essential to ascertain what are the

(1) [1913] A. C. 546.

(2) Q. R. 45 S. C. 109, 121.

powers conferred by the Code, and, according to their contention, by these no right of appeal exists. Sect. 54 of the Code establishes the Circuit Court and defines and limits its jurisdiction. It is in the following terms :—

" 54. The Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court : (1.) In all suits wherein the sum claimed or the value of the thing demanded is less than one hundred dollars, saving the exceptions contained in the following article and such cases as fall exclusively within the jurisdiction of the Exchequer Court of Canada, and suits in matters of petition of right ; (2.) In all suits for school-taxes or school-fees, and all suits concerning assessments for the building and repairing of churches, parsonages, and churchyards, whatever may be the amount of such suits."

From this it will be seen that, so far as this section is concerned, the District Court as part of the Circuit Court has no jurisdiction in cases of $100 and upwards excepting in cases relating to school-taxes, school-fees, and other matters specifically mentioned in sub-s. 2. With regard to both branches of the section, its jurisdiction is ultimate and complete. The County Court—that is, a Court sitting elsewhere than at the chief place of the district—has, however, in addition to the jurisdiction conferred upon it by s. 54, a further jurisdiction between $100 and $200, conferred upon it by s. 55, but this is subject to appeal. It also has jurisdiction with regard to matters specified in sub-s. 2 of s. 55. There is, therefore, so far as these sections are concerned, no power whatever to appeal from any judgment of the District Court.

Sect. 52 provides for the Court to which the appeals lie. The first three sub-clauses, which are all that are material, are as follows : " 52. An appeal lies to the Court of Review : (1.) From every final judgment of the Superior Court or of the Circuit Court, susceptible of appeal to the Court of King's Bench ; (2.) From any final judgment of the Superior Court in suits in which the sum claimed or the value of the thing demanded is less than five hundred dollars ; (3.) From any final judgment of the Circuit Court in which the sum claimed or the value of the thing demanded amounts to or exceeds one hundred dollars except in suits for the recovery of assessments for schools or school houses, or for monthly contributions to schools, and in suits for the building and repairing of churches, parsonages, or churchyards. . . . ." Sub-s. 1 relates to the appeal given in certain named cases by s. 44. Sub-s. 2 has nothing to do with the present dispute. The right to appeal, if it exists, must be found in sub-s. 3. The appellants contend that the power there conferred is adequate, as it includes any final judgment of the Circuit Court exceeding $100. But it must be remembered that under this Code no judgment of the District Court could be given in any matter exceeding $100 excepting the matters specified in sub-s. 2 of s. 54, and they are expressly excluded. Any final judgment of the Circuit Court referred to in s. 52 is, in their Lordships' opinion, a judgment contemplated by the Code of Civil Procedure itself, for their attention has not been directed to any statute under which further and more extended jurisdiction was conferred upon the Court at the time of the passing of the Code. The consequence is that the right to recover the taxes has been conferred upon the municipality with regard to a Court from whose judgment no right of appeal exists, and it cannot, in their opinion, be introduced by giving the words in sub-s. 3 of s. 52 a meaning which would only be apt if they were considered in relation to an extended jurisdiction not provided for by the Code in which the section finds its place.

There is a further point also raised by the respondents to which, in their Lordships' opinion, no sufficient answer has been found. By the Statutes of Quebec, 10 Geo. 5, c. 79, the whole of the sections of the Code of Civil Procedure in which the provisions relating to the Circuit Court and the rights of appeal find place are declared to be replaced by other provisions, and so far as the Circuit Court is concerned the provisions as to appeal drop out. Sect. 42, however, provides that the Court of King's Bench shall have jurisdiction in all matters from all Courts wherefrom an appeal by law lies, and s. 64 provides: "Unless otherwise provided by this Act, all cases, matters or things which, at the time of its coming into force, were within the competence of the Court of Review, shall be within the competence of the Court of King's Bench, sitting in appeal."

Now this appeal had not been brought when the statute was passed, although the proceedings before the Circuit Court had been instituted. Consequently the statutes giving whatever right of appeal may have existed were replaced by sections which gave none, and s. 64 of the Act, which provided that matters within the competence of the Court of Review should be subject to the Court of King's Bench, must be regarded as qualified by the provision that the powers of the Court of Review with regard to the Circuit Court had been taken away, and consequently to that extent the statute "had otherwise provided."

For these reasons their Lordships think that the appeal fails and must be dismissed with costs. The petition to quash the appeal as incompetent lodged by the respondents, which was before the Board on July 27, 1921, and was ordered to stand over until the hearing of the appeal, will be formally dismissed, and the appellants will be entitled to set off their costs in relation to it against the costs which they are now ordered to pay. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1921
Dec. 20.

FORBES . . . . APPELLANT;

AND

GIT AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract—Alleged Repugnancy—Building Agreement—Agreement to do work in consideration of certain Payments—Clause providing different Price.

The appellant contracted with the respondents to carry out work in altering their restaurant. The contract by its first clause witnessed that in consideration of $3000 payable by three instalments, the appellant agreed to furnish the materials and perform the services stated in the contract. Details of the work followed, and there was a final clause to the effect that the respondents were to pay to the appellant the value of the materials provided and labour done, each at 12½ per cent. over cost, whether that value exceeded or was less than $3000. The materials and labour considerably exceeded that sum, and the appellant sued for a balance based upon the final clause:—

Held, that the appellant was entitled to recover on that basis, since the first clause did not necessarily mean that the contract price was to be $3000, and there was therefore no repugnancy between it and the final clause so as to make the first clause prevail.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (March 11, 1921) reversing a judgment of the Appellate Division of the Supreme Court of Ontario (May 7, 1920) and restoring the judgment of a judge of that Court at the trial of an action.

The action was brought by the present appellant against the respondents to recover in respect of building work carried out for them under an agreement in writing.

The facts of the case and the terms of the agreement appear from the judgment of their Lordships.

1921. Nov. 29. *Woods K.C.* and *Moss* for the appellant.
T. Mathew for the respondents.

Dec. 20. The judgment of their Lordships was delivered by

LORD WRENBURY. The appellant is a building contractor. The respondents are restaurant keepers, who may be called the building owners. The question on the appeal is as to the construction of a contract between these parties for works of alteration, construction and fitting up in a restaurant and public dining room on the first floor over 119½ King Street East, in the City of Hamilton. The contract is dated March 5, 1919, and is made between the building owners of the first part and the contractor of the second part. The relevant clauses are three in number, and for convenience will be referred to as the first, second and third clauses.

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

After a recital that the contractor has agreed to supply certain materials and perform certain services, the deed proceeds by the first clause as follows: " Now this agreement witnesseth that in consideration of the sum of $3000 to be paid as follows: $1000 on the signing of this agreement, further sum of $1000 when it appears to the satisfaction of all of the parties hereto that materials have been furnished and services performed to the extent of $2500, and the balance or sum of $1000 thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform services as hereinafter set forth."

The deed then details the work to be done and the materials to be supplied. These leave such things as the size of a mirror, the size and location of a private sleeping room and the size and location of two public dining rooms " to be agreed upon between the parties."

The deed then proceeds by the second clause as follows: " The parties of the first part covenant with the party of the second part that if it is ascertained upon the removal or the attempting to remove the partition or partitions that the construction of the building will not permit such removal without serious damage to same then this agreement is to be at an end and the parties of the first part will reimburse the party of the second part for labour expended up to such time and the party of the second part covenants that he will return so much of the $1000 payment as remains after satisfying his claim for labour performed."

J. C.
1921
FORBES
v.
GIT.

Next follows the third clause which runs as follows: "The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than $3000 then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than $3000 then the final payment will be the actual amount expended by the party of the second part over $2000 plus 12½ per cent. instead of $1000 as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus 12½ per cent."

The work to be done as described in the contract was very largely varied, added to and departed from, not merely by the addition of extras, but by substantial and extensive alterations in the scheme.

A dispute arose between the parties as to the amount payable by the building owners. The contractor brought an action against the building owners in the Supreme Court of Ontario to recover $3830.36, being as he alleged the amount due to him on the footing that under the third clause he was entitled to the difference between a sum of $7010.36 which he said was due to him under the third clause, and the sum of $3180, which had been paid him on account. The trial judge held that the third clause was repugnant to and inconsistent with the first clause and was to be rejected, and he gave judgment on the basis of $3000 being the contract price, but with the addition of the value of certain charges (that is to say, additional work) which he identified.

The Supreme Court of Ontario reversed this judgment, holding that the first and third clauses were to be read together and effect was to be given to the third clause.

On appeal the Supreme Court of Canada reversed the judgment of the Supreme Court of Ontario and restored the judgment of the trial judge. By special leave the case is brought on appeal to this Board.

The principle of law to be applied may be stated in few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the deed prevails over the later. Thus if A covenants to pay 100*l.* and the deed subsequently provides that he shall not be liable under his covenant, that later provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus if A covenants to pay 100*l.* and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in manner described.

Furnivall v. *Coombes* (1) is an illustration of the former case: *Williams* v. *Hathaway* (2) is an illustration of the latter.

In the latter case there could be no question if the later provision of the deed were introduced by the word "but" or the words "provided always nevertheless," or the like. But there is no necessity to find any such words. If a later clause says in so many words or as matter of construction that an earlier clause is to be qualified in a certain way, effect can be given and must be given to both clauses.

Their Lordships do not find that any of the judges in the Supreme Court of Canada differed upon this point or doubted that the principle to be applied is such as stated above. But four of them found, while the Chief Justice and Duff J. did not find, repugnancy between the first clause and the third.

---

(1) (1843) 5 Man. & G. 736.

(2) (1877) 6 Ch. D. 544.

To ascertain whether such repugnancy exists it is necessary to scrutinise the deed.

The first clause provides that in consideration of a certain sum payable in certain instalments the contractor will furnish certain materials and perform certain services. The second clause says that in a certain event that sum is not to be paid, that the agreement is to be at an end and payment is to be made only for labour expended. The operation of the first clause is therefore obviously qualified by the second clause. The first clause, therefore, does not prevail in every event. It falls to the ground in the event named in the second clause.

Then comes the third clause, on which the question arises: If this were introduced by the word "but" or the words "provided always nevertheless" there would be no room for argument. Their Lordships cannot find that the absence of such words makes any difference. The third clause does not destroy the first, but qualifies it. Its effect may be said to be to make the $3000 of the first clause an estimated sum whose accuracy is to be tested and controlled by taking the accounts for which provision is made in the third clause. The obligation of the first clause is qualified not only by the second clause (as it obviously is), but by the third clause also. Their Lordships find no difficulty in reading the first and third clauses together and giving effect to the intention disclosed by the deed as a whole.

There is another consideration leading to the same result which their Lordships desire to add. If the first clause stood alone it may well be that the contractor bound himself to do certain work and to accept as payment an agreed sum of $3000 payable in certain instalments. But the clause does not necessarily bear that meaning. It may mean that in consideration of $3000 payable by certain instalments he binds himself to do certain work for a sum which you will presently find defined. If one farmer says to another, "In consideration of your inviting me to your Christmas dinner I will make your hay for you next summer," he does not necessarily mean that the dinner will be accepted as the price of making the hay—he may mean that if he is invited to dinner he will bind himself to find the time and the necessary implements and the labour for making the hay when the summer comes, leaving the amount to be paid for the work to be determined later.

When Anglin J. says: "By the first clause of a contract under seal the plaintiff 'covenanted, promised and agreed' to do certain specified work in the nature of alterations to a building for the sum of $3000 payable in three instalments of $1000 each"; and when Mignault J. says: "The first court considered absolutely irreconcilable the clause in the contract that the respondent would for the sum of $3000 perform the work and furnish the materials specified"; and again: "The work by the first clause is to be performed for a fixed price"; neither of those learned judges is correctly quoting the contract. There is no contract in the first clause to do the work for $3000. The contract is that in consideration of $3000 he will do the work. It is necessary to read the contract as a whole to see whether the $3000 is to be the contract price for the work, or is to be a payment for undertaking the obligation to do the work. If there were no third clause it may well be that the $3000 would be the contract price, but looking at the third clause their Lordships do not find that it is.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court of Ontario was right, that this appeal should be allowed and the order of the Supreme Court of Ontario should be restored, and that the appellant should have his costs here and in the Supreme Court of Canada. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1921
Oct. 24.

HAMEED AND ANOTHER . . . . . . APPELLANTS;

AND

SPECIAL OFFICER UNDER THE WASTE LANDS ORDINANCES . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Chena Lands — Presumption of Crown Ownership — Waste Lands Ordinance (No. 1 of 1897, Ceylon), s. 24—Decree in Partition Suit—Crown not bound—Ordinance No. 10 of 1863, s. 9.

Upon the true construction of s. 24 of the Waste Lands Ordinance (No. 1 of 1897, Ceylon) all chenas are to be presumed to be Crown property; the words "which can be only cultivated after intervals of several years" qualify the words "other lands" only. The Crown not being named in Ordinance No. 10 of 1863, s. 9, a decree in a partition suit does not bind the Crown.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment and decree (February 13, 1920) affirming a decree of the District Court of Kurunegalle.

The appeal arose out of proceedings under the Waste Lands Ordinance No. 1 of 1897, the appellants being plaintiffs and the respondent defendant. The main questions for determination were whether the lands in suit were "chenas" (a word explained in the judgment); and, if so, whether upon the true construction of s. 24 of that Ordinance a presumption arose that they were the property of the Crown.

The facts as to the lands in question and the terms of the relevant enactments appear from the judgment.

Evidence was given at the trial on behalf of the appellants, and was accepted by the District Judge, that the lands in question were capable of being cultivated for the production of rubber and cocoa. The learned judge however found that, with the exception of certain forest land, the lands were chenas within the Kandyan Province. He also held that the presumption enacted by Ordinance 12 of 1840, s. 6,

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON and LORD CARSON.

J. C.
1921
HAMEED
v.
SPECIAL
OFFICER.

and Ordinance 1 of 1897, s. 24, arose and that there was no evidence to displace that presumption.

On appeal the Supreme Court (Bertram C.J. and De Sampayo J.) affirmed the decision. The appeal is reported at 21 Ceylon N. L. R. 353.

1921. Oct. 21, 24. *Cyril Atkinson K.C.* and *Percival Smith* for the appellants. Having regard to the quality of the lands in suit they were not "chenas" within the meaning of s. 24 of Ordinance 1 of 1897. The collocation of words in the section shows that the expression is not used of good land such as this, suitable for rubber or cocoa growing. If the meaning of the word has become extended the extension does not affect the presumption, since it was enacted originally in 1840 before any such extension. But if these lands are "chenas" within s. 24, they are expressly excluded from its operation by the words "which can be only cultivated, etc." Those words qualify the word "chenas" as well as "other lands." That appears from s. 6 of the Ordinance of 1840, where the words are "chena or other lands which, etc." [Reference was made to *Queen's Advocate* v. *Appuhami* (1); *Kirihami* v. *Appuhami* (2); *Corea Mudaliyar* v. *Punchirala* (3); *Attorney-General* v. *Wanduragola* (4); and *Cooke* v. *Freeman.* (5)] The last-named case relates to s. 1 and not to s. 24; different considerations apply. Further, the presumption is displaced by the partition decree obtained in 1916; that decree was "conclusive against all persons" by s. 9 of Ordinance 10 of 1863.

Tomlin K.C. and *Giveen* for the respondent. There were concurrent findings that these lands were chenas or forest lands. The only question is as to the construction of s. 24. There is no reason why the words "which can be only cultivated, etc.," should qualify anything besides the words "other lands" which they immediately follow. That view is in accordance with the decisions of the Supreme Court in

(1) (1878) 1 Sup. Ct. Cir. 26.
(2) (1879) 2 Sup. Ct. Cir. 88.
(3) (1899) 4 Ceylon N. L. R. 135.
(4) (1901) 5 Ceylon N. L. R. 98.
(5) (1905) 8 Ceylon N. L. R. 265.

1899 and 1905 already referred to. It is unlikely that s. 24 was intended to apply to only one species of chenas, or that the quality of the lands was to be a factor. The Crown not being mentioned in Ordinance No. 10 of 1863, s. 9, is not bound by its provisions. Ordinance No. 21 of 1901, s. 14, expressly provides that enactments do not bind the Crown unless by necessary implication.

Cyril Atkinson K.C. replied.

Oct. 24. The judgment of their Lordships was delivered by

LORD BUCKMASTER. This is an appeal from a decree of the Supreme Court of the Island of Ceylon affirming the decision of the judge of the District Court of Kurunegalle on a claim put forward by the appellants to certain lands in the district to the extent of some 278 acres.

The matter came before the District Judge on a reference under s. 5 of the Waste Lands Ordinance of 1897, and the question which it involved was whether or no the Crown were entitled to the land in dispute by virtue of the provisions of the Ordinance No. 12 of 1840 or the Ordinance of 1897. The later amending Ordinances of 1899, 1900 and 1903 are not involved in the dispute.

The facts were these: The appellants in 1914 and 1915 acquired their alleged rights in the lands by purchase from one James Marambe, who had acquired the same in 1913 for Rs.300 from the villagers, who claimed by right of inheritance. On November 29, 1916, one of the appellants obtained against the other a partition decree awarding part of the land to one and part to the other, and armed with this authority, they sought to establish their title against the Crown. The short answer put forward by the Crown was that the land in question was chena land, and that consequently it was the property of the Crown by virtue of s. 24 of the Ordinance of 1897.

The real question that arises upon this appeal is whether or not that defence can be maintained. Chena lands are well known and their description is clearly understood. They are jungle lands subjected to periodic cultivation by means of

J. C.
1921

HAMEED
v.
SPECIAL
OFFICER.

burning down the jungle and then growing some grain crop upon the site. After this crop has been grown the land relapses back once more into jungle until the period has come when it can again be profitably burned and the process of cultivation resumed. It is unnecessary to discuss the quality of this system of agriculture. It seems by common agreement to be an extremely extravagant and wasteful use of the land, and one adapted to people who are not devoted to the arduous process of regular husbandry.

The Ordinance of 1897, following on an earlier Ordinance of 1840, expressly dealt with these lands. It began with a recital that it was expedient "to make special provision for the speedy adjudication of claims to forest, chena, waste and unoccupied lands"; and then by s. 1 it provided that: "Whenever it shall appear to the Government Agent of a province or to the Assistant Government Agent of a district that any land or lands situated within his province or district is or are forest, chena, waste or unoccupied," it shall be lawful for him to declare the same by a notice, and then certain procedure results. By s. 24, which is the critical section in the present dispute, it is provided that: "All forest, waste, unoccupied or uncultivated lands, and all chenas and other lands which can be only cultivated after intervals of several years shall be presumed to be the property of the Crown until the contrary thereof be proved."

The appellants contend that the qualification to be found in that section as to lands, which can only be cultivated after intervals of several years, is a qualification which attaches to the chenas, and that it must therefore be read as meaning that it is only such parts of the chena land as are incapable of cultivation by any other method than by chena cultivation that are subject to the operation of the section.

In the first place, their Lordships think it right to say, especially having regard to an earlier decision (*Queen's Advocate* v. *Appuhami* (1)), that in their view the character and quality of the chena lands must be determined by the actual use of the land itself and not by its potential possibilities. Land that is chena land cannot be taken out of the category merely by evidence to show that by another method of cultivation, by the application of other processes in other hands, it might be cultivated in a different way.

---

(1) 1 Sup. Ct. Cir. 26.

That, of course, does not dispose of the appellants' contention, because it may even yet be that the Ordinance was only intended to cover this limited and particular section of the chena property; but having given careful consideration to the very full argument that was advanced by the appellants upon this point, their Lordships are unable to accept it. They do not think that the expression "which can be only cultivated after intervals of several years" has any application to chenas. They think that the section means that each enumerated head stands alone and unqualified, and the last of these is the "other lands which can only be cultivated after intervals of several years." What those other lands may be which can be the subject only of such cultivation no one before their Lordships has been able to suggest, but they are general words intended to gather up and to sweep into the ambit of this section such lands as might not be within the description of the preceding words. The introduction of the word "and" before chenas lends some support to the appellants' contention, but their Lordships regard this conjunction as knitting together the specified classes mentioned by name, and to these the other lands are added.

It was urged on behalf of the appellants that this view did not do full justice to the history of the legislation, and that the earlier Ordinance which was passed in 1840 showed that a different meaning should be given to the clause. In the Ordinance of 1840 the critical section was s. 6, the earlier part of which ran in much the same language as that of s. 24 of the later Ordinance, but it continued by providing that: "in all other districts in this colony such chena and other lands which can only be cultivated after intervals of several years shall be deemed to be forest or waste lands within the meaning of this clause"; and it is said that there "chena" must be subject to the qualification as to the possibility of cultivation, because it is used in the form of an adjective

J. C.
1921
HAMEED
v.
SPECIAL
OFFICER.

and not in the form of an independent noun. Their Lordships are not greatly impressed with that argument. Even assuming that that were the true construction of s. 6, it would not throw any great light upon the interpretation of the later Ordinance, but even in that section they do not regard the suggested interpretation as accurate. In their Lordships' view the words " such chena and other lands " are properly construed as meaning such chena lands and the other lands which can only be cultivated in the manner described, and there is no reason why the chena lands should be subject to the limitation suggested. This is, in their Lordships' view, the fair interpretation of some rather ambiguous language, and it is the only interpretation which can give both sense and justice in the operation of the clause. It would be impossible to know for certain what were the inherent capacities of the soil that was subject to jungle growth, and if any other method of determination were selected than that of the actual user there would be the possibility of great difficulties in connection with conflicting evidence given, not as to facts, but as to remote and hypothetical possibilities.

Their Lordships have only to add that the other question argued, as to whether the operation of the Ordinance is to date from the date of the Ordinance or from the time when the claim is made, is one that does not arise for determination in the present case, for here admittedly these lands retained their existing quality at the moment when the dispute arose.

Their Lordships are glad to find that the view that they have expressed appears to be in agreement both with the judgments in *Corea Mudaliyar* v. *Punchirala* (1) and *Cooke* v. *Freeman.* (2)

The argument with regard to the title given by the partition decree is one which cannot be maintained. It arises under s. 9 of the Ordinance No. 10 of 1863, which provides that a decree for partition or sale under the Ordinance shall be good and conclusive against all persons whomsoever. It is unnecessary to consider whether this section establishes

---

(1) 4 Ceylon N. L. R. 135.

(2) 8 Ceylon N. L. R. 265.

J. C.
1921
HAMEED
v.
SPECIAL
OFFICER.

title to the land as against strangers or only title to the shares as against interested parties; it is sufficient to say there is nothing in the Ordinance to bind the Crown, and it would indeed be a remarkable thing if a partition decree effected between two or three parties, it might be by arrangement among themselves, should have the effect of depriving the Crown of the important rights conferred under the Ordinance in question.

For these reasons their Lordships think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Freeman & Cooke.*
Solicitors for respondent: *Burchells.*

[PRIVY COUNCIL.]

J. C.*
1922
Jan. 22.

ATTORNEY-GENERAL FOR MANITOBA APPELLANT;

AND

KELLY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA.

[AND CROSS-APPEAL.]

Arbitration—Award—Construction of Submission—" All Loss "—Finality of Award.

In an action in Manitoba against building contractors to recover sums improperly paid to them under a contract, and for damages, a judgment by consent was entered whereby it was provided (inter alia) that the plaintiff should recover, among other sums, " all loss to the plaintiff by reason of defective workmanship and materials," and that there should be set off against the sums recovered by the plaintiff the fair value of the work done and materials provided at fair contractor's prices. The judgment provided further that the sums to be debited and credited were to be determined by two appraisers, and that any matter upon which they differed was to be referred to a named umpire whose decision thereon was to be final; and that the Manitoba Arbitration Act should not apply. The defendants moved to set aside or vary an award made:—

---

* *Present:* LORD ATKINSON, LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and LORD PHILLIMORE.

Held, that under the words "all loss" there was jurisdiction to award to the plaintiff not only sums actually expended at the date of the award, but also a sum estimated as being necessary to make good the defects; and that extrinsic evidence was not admissible to show that the sum allowed to the defendants as set-off had been reduced in respect of defective work for which they had also been debited; further, that the award being within the jurisdiction conferred by the submission, and there being no error apparent on its face, it could not be questioned either on the facts or on the law.

Judgment of the Court of Appeal reversed.

APPEAL and CROSS-APPEAL from a judgment (December 1, 1920) of the Court of Appeal of Manitoba reversing a judgment (October 3, 1919) of the Court of King's Bench of Manitoba.

The appeal and cross-appeal arose out of a motion by the respondents to set aside or vary an award dated May 25, 1917, made under a submission to arbitration contained in a consent judgment in an action brought by the appellant against the respondents. The litigation related to the building of parliament buildings at Winnipeg. The facts appear from the judgment of the Judicial Committee.

Curran J. dismissed the motion. The Court of Appeal by a majority (Perdue C.J.M., Fullerton J.A., and Dennistoun J.A.; Cameron J.A. dissenting) allowed an appeal to the extent of striking out from the award an item of $615,213. That item had been awarded under para. 2 (*b*) of the consent judgment (see p. 273 infra) as "Estimate of expenditure necessary to complete the repair of caisson foundations." In the opinion of the majority of the Court of Appeal the words "all loss" in para. 2 (*b*) of the consent judgment did not include more than expenditure actually incurred at the date of the inquiry, and consequently the submission did not confer any jurisdiction to include the item in the award. Both parties appealed to the Privy Council; the cross-appeal sought to set aside the whole award, or to vary it further by excluding another item not material to this report.

1921. Nov. 15, 17, 18, 21. *Sir John Simon K.C.*,

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA v. KELLY.

J. K. Johnson K.C. (*Attorney-General for Manitoba*) and *Hon. Geoffrey Lawrence* for the appellant.

A. J. Andrews K.C., *T. Sweatman K.C.* and *Pritt* for the respondents.

[Reference was made to *Duke of Buccleuch* v. *Metropolitan Board of Works* (1); *Fraser* v. *City of Fraserville* (2); *In re Green & Co. and Balfour, Williamson & Co.* (3); and *Dobson* v. *Groves.* (4)]

1922. Jan. 24. The judgment of their Lordships was delivered by

Lord Parmoor. The appellant, the Attorney-General of the Province of Manitoba, brought an action against the respondents, asking to have set aside a certain building contract which had been entered into between the respondents and the Province of Manitoba, for the erection of buildings in the City of Winnipeg; for the return of certain moneys alleged to have been improperly received; damages and other relief incident thereto. The action came on for hearing before Mathers C.J. in the Court of King's Bench, and a consent judgment was entered on March 22, 1917. By the said judgment certain matters were referred to two appraisers, appointed respectively by the plaintiff and the defendants, and in the event of the appraisers not being able to agree, such matters were referred to Robert Macdonald of the City of Montreal, an architect and engineer, accepted as umpire by both parties. So far, therefore, as the appraisers agreed, they occupied the position of arbitrators; but, in the event of disagreement, their functions terminated, and an independent jurisdiction was conferred upon Macdonald, who, throughout this judgment, is referred to as umpire. The judgment further provided that the report of the umpire should be final and conclusive between the parties, and that the judgment should be a final judgment for the amount shown in the said report. On May 25, 1917, the umpire appointed under the aforesaid order of the Court of King's Bench made

(1) (1872) L. R. 5 H. L. 418.
(2) [1917] A. C. 187.
(3) (1890) 63 L. T. 325.
(4) (1844) 6 Q. B. 637.

his report, and on March 4, 1918, the respondents, by notice of motion, moved to set aside or vary the report on the ground that the umpire had exceeded his powers and purported to decide a matter not submitted to his jurisdiction, including among the debits charged against the respondents a sum of $615,213, being an "estimate of expenditure necessary to complete the repair of caisson foundations." After the hearing had begun before Curran J., sitting as a judge in chambers, and also in Court, a charge of misconduct against the umpire was added by amendment. On October 3, 1919, Curran J. dismissed the motions of the respondents. The Court of Appeal allowed the appeal of the respondents from the judgment of Curran J. in so far as he refused to vary the report of the umpire by deducting therefrom the "estimate of expenditure necessary to complete the repair of caisson foundations $615,213," and ordered that the report of the umpire should be varied by striking out the said item, and that the principal sum recoverable by the appellant from the respondents be reduced to the sum of $592,138.

This is an appeal from so much of the judgment of the Court of Appeal as varied the judgment of Curran J. The respondents further cross-appeal that the report should be set aside on the ground that the appraiser for the appellant was guilty of misconduct in forwarding a certain letter and document to the umpire and that the umpire was guilty of misconduct in withholding from the appraiser appointed by the respondents the last page of a report of Bylander, the appellant's engineer, and of not stating truthfully, honestly and accurately the contents of the last page of the said report to the appraiser appointed by the respondents, or that in the alternative an item, $34,484, "one-half costs of the Royal Commission appointed to investigate all matters in connection with the parliament buildings, known as the Mathers Commission," should be disallowed.

A preliminary objection was raised before Curran J. and the Court of Appeal, that the motions should be dismissed on the ground that they were misconceived and could not affect the consent judgment. It was said that the report

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA
v.
KELLY.

of the umpire became, on filing, an integral part of the consent judgment, making the judgment a final judgment for the amount shown in the report, and that the judgment had not been set aside and could not be impeached except by separate action, or petition on a charge of fraud.

Curran J. rejected any general objection to his jurisdiction, and held that he had jurisdiction to entertain the charges of alleged misconduct by the umpire, and to hear objections based on the allegations that on certain items in his report the umpire had exceeded his jurisdiction. In the Court of Appeal Cameron J.A. expressed a contrary opinion, and that the motions made on behalf of the respondents to set aside or amend the report were misconceived and futile, and should on this ground or line be dismissed. On the hearing before their Lordships, the counsel for the appellant did not press this preliminary objection, and asked their Lordships to entertain the appeal on its merits, in order that an end might be put to this unfortunate litigation. Their Lordships accordingly heard the appeal on its merits. It must not be inferred that their Lordships express any opinion adverse to that expressed by Cameron J.A.

The report of the board of appraisal was issued at Winnipeg, on May 25, 1917. It shows on its face that on some items the appraisers agreed, and that on some items the decision had been referred to the umpire.

[Their Lordships' judgment set out in full the award as to the sums to be debited and credited. The amount to be debited under para. 2 (*b*) of the consent judgment (see p. 273 infra) was $831,119, of which $615,213 was stated to be "estimate of expenditure necessary to complete the repair of caisson foundations." The amount awarded to be set off under para. 3 (*a*) of the consent judgment was $1,059,252; of which $241,077 was agreed by the appraisers and $818,174 was determined by the umpire.]

On the debits and credits, as found by the appraisa board, there is a balance in favour of the respondents of $473,605, but, after bringing in the sum fixed in the judgment at $1,680,956, as a debit charge, against the respondents, the ultimate balance in favour of the appellant is $1,207,351.

In the Court of Appeal sixteen grounds of appeal were raised by the respondents; but in the argument before their Lordships these were reduced to three: (1.) That in respect of two items debited by the umpire against the respondents, the umpire had exceeded the authority which the agreed submission conferred upon him. (2.) Misconduct on the part of one of the appraisers, Oxton, and on the part of the umpire. (3.) That the report was against law, evidence, and the weight of evidence.

The consent judgment, which contains the terms of the agreed submission, ordered (inter alia): "(1.) That all the contracts referred to in the statement of claim herein be and the same are hereby set aside. (2.) That the plaintiff do recover from the defendants. (*a*) The sum of $1,680,956.84, in which amount is included the sum of $500,000, the amount of a certain bond dated July 31, 1913. (*b*) All loss to the plaintiff by reason of defective workmanship and materials, including the reasonable costs of ascertaining and remedying such defects.

"Provided that in ascertaining such amounts the appraisers, or in case of disagreement, the umpire, shall be the judges as to whether or not the work was defective and to what extent, and shall also be the judges as to what extent the investigations carried on for the purpose of ascertaining and remedying such defects were necessary, and what amount of money, if any, paid for that purpose shall be charged to the defendants.

"(3.) The defendants shall be entitled to set off against the amount provided for in para. 2 hereof. (*a*) The fair value of the work done and materials provided by the defendants on the new parliament buildings in the City of Winnipeg so far as erected on May 19, 1915, on the basis of a fair contractors' price (including reasonable contractors' profit) for the work done and materials furnished. . . . . (*b*) The value of the plant and materials taken over by the Government as at the time they were placed on the ground. (*c*) The fair value of any work which had been done and which was

J. C.
1922

ATTORNEY-GENERAL FOR MANITOBA
v.
KELLY.

afterwards torn down and replaced by the defendants by order of the provincial architect on account of, and made necessary by, change or changes in plan. . . . . (6.) In the event of the appraisers not being able to agree on any of the matters herein referred to, or in the event of one of the appraisers being dissatisfied with the diligence of the other in proceeding with any matter hereunder, such matter or matters shall be referred by either appraiser to Robert Macdonald, of the City of Montreal, architect and engineer, who is hereby by both parties agreed to as umpire, and whose decision thereon shall be final. (7.) The appraisers and the umpire are to be entitled to form their own opinion as to the fair value and proper charge or allowance hereunder to be made in respect of all matters submitted hereunder from their own knowledge, inspection or examination, or from such other source as they may deem proper, and for that purpose may cause any work to be uncovered or any investigations to be made which the appraisers agree upon or the umpire desires. . . . . (11.) The appraisal hereunder shall not be subject to the provisions of the Manitoba Arbitration Act. (12.) If on striking the balance hereunder it is found that the balance is in favour of the plaintiff, the defendants shall pay to the plaintiff the balance so found with interest at the rate of five per cent., from July 1, 1914, to date of payment."

It is noticeable that, under para. 6 the decision of the umpire, agreed to by both parties as umpire, is to be final; and that under para. 7 the appraisers and the umpire respectively are entitled to form their own opinion on all matters submitted to them either from their own knowledge, inspection, or examination, or from such other sources as they may deem proper, thus constituting them judges both of the materiality and of the weight of all evidence which they deemed it proper to admit.

A voluminous mass of evidence was adduced before Curran J. Only a small portion of this evidence is admissible or should have been admitted. The transcript of the proceedings, when the appraisers and the umpire met before the umpire issued his report, is not admissible unless it can be regarded as a document so closely connected with and incorporated in the report as to be considered part of the report, and to be looked at in the same way as the report itself. In the opinion of their Lordships it is not possible to accept this view.

Evidence was further adduced before Curran J., giving the opinion of experts on the method in which the inquiry was conducted, and traversing the conclusions of the umpire, as stated in the report. In effect, the Court on this evidence was asked to review the decision of the umpire on questions submitted to him, by the parties, for his final decision. Such evidence would not be admissible in the case of an award under arbitration proceedings conducted according to ordinary practice. In the present submission, the umpire is entitled, under the terms of the submission, to form his own opinion as to the fair value and proper charge or allowance to be made in respect of all matters submitted to him from his own knowledge, inspection or examination, or from such other source as he may deem proper. Unless, therefore, the umpire has been guilty of misconduct, it is within his discretion and authority either to act on his own knowledge, inspection or examination, or to obtain information from any other source, which in his opinion he may deem proper. It is not incumbent on him to state how he has acted, and it is impossible for the Court to ascertain what considerations have affected his judgment. The matter is one which the parties have intended to withdraw from the Courts in order that the issue in the litigation may be finally determined by their chosen nominee, and all extrinsic evidence that other experts would have proceeded in a different manner, or reached a different conclusion should, in the opinion of their Lordships, have been rejected as inadmissible.

The jurisdiction of the umpire is derived solely from the agreement of the parties contained in the consent judgment. This document is a written document, which cannot be explained, and much less varied, by extrinsic evidence, of subsequent facts or events. Except so far as the pleadings in the action are of assistance in the interpretation of the document, by showing the surrounding conditions when the agreement was made, none of the evidence adduced before Curran J. is admissible or should have been admitted in determining the extent or limitations of the umpire's authority. Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision rests ultimately with the Court and not with the umpire: *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* (1) It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties. In the present instance there has been a difference of opinion as to the extent of the jurisdiction which has been conferred by the submission upon the umpire. The majority of the Court of Appeal have adopted a narrower construction than Curran J. and Cameron J.A.

The crucial paragraph in the submission is para. 2 (*b*). The words "all loss" with which the paragraph commences would naturally cover all loss ascertained or ascertainable by reason of defective workmanship and materials, irrespective of when, or whether, the defects have been remedied, and of whether, or not, out-of-pocket expenses have been incurred, at the time when the assessment of damage is made. It is open to the party in whose favour the assessment is made either to repair the damage on which his claim is based, or to take the risk of leaving the defects as they are, and to place the money to his credit as compensation. The majority of the Court of Appeal have held that, owing to the conditions under which the agreed submission was made, to the context in which the words are found, and to the terms of the interest paragraph, the words "all loss" have a limited meaning and only include such loss as had been already ascertained and in respect of which moneys had been actually disbursed.

(1) [1916] 1 A. C. 314, 327, 329.

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA
v.
KELLY.

Perdue C.J.M. says in his judgment, "The word 'loss' in para. 2 (*b*) taken in the connection in which it is found, means money loss, money out of pocket." This construction was supported in an able argument by the counsel for the respondents before their Lordships on various grounds. It was said that paragraph 12, which provides that, if there is a balance in favour of the plaintiff, the defendants shall pay on such balance interest at 5 per cent. from July 1, 1914, to date of payment, shows that the plaintiff must be deemed to be out of pocket, in respect of any balance found in his favour, and that this provision was not applicable, if it was open to the umpire to estimate damage in respect of a loss that might not occur, and which, if it did occur, might not be remedied. On the other hand it was argued, on behalf of the appellant, that July 1, 1914, was simply a compromise date, agreed between the parties, and that there was no reason why interest should not run from this date on the balance in favour of the plaintiff, whether that balance is based solely on out-of-pocket expenditure, or includes a sum assessed by the umpire in respect of ascertainable loss, although, so far, no expenditure in respect of such loss had been made. Suggestions were made before their Lordships as to the reasons why the date of July 1, 1914, had been chosen, but their Lordships are concerned to consider the actual language employed, and it is beyond their province to enter the region of speculation. Their Lordships cannot find in para. 12 any more than a provision for interest from an agreed date, in itself not inconsistent with giving to the words "all loss" in para. 2 (*b*) their ordinary and normal meaning.

It was further argued that the words "including the reasonable cost of ascertaining and remedying such defects" excluded an estimate of loss not based on actual out-of-pocket disbursements. Their Lordships, however, cannot construe the word "including" as connoting exclusion. The words "such defects" are equally apposite, whether they refer back to a limited loss calculated on out-of-pocket expenses, or to a loss which comprehends all sources of ascertainable damage. The respondents further relied on the word "paid" which occurs at the end of the proviso, but the context shows that the word "paid" is not applied to "loss" but to expenditure on investigations carried on for the purpose of ascertaining and remedying defects. This passage authorizes the umpire to estimate to what amount money, if any, paid for the purpose of investigation, shall be charged to the debit of the respondents. It is under this provision that the umpire has debited the respondents with the sum of $34,484, being one-half cost of the Royal Commission known as the Mathers Commission.

Their Lordships have considered the important matter raised prominently in the judgment of Dennistoun J.A., that unless the words "all loss" are restricted to out-of-pocket disbursements for work done, to the exclusion of any estimate of expenditure necessary to complete the repair of the caisson foundations, there is a risk that the respondents would be charged twice over for their defective workmanship and materials in connection with the caisson foundations. The appellant denies that there is any proof that the umpire has made any such error in his report. No question was raised by the respondents as to the summary of the credits found in their favour, amounting in the aggregate to $1,304,724, and under each head a proportion of the total amount has been agreed by the appraisers. Of the total of $1,304,724, no less than $1,059,252 represents the value of the work done and materials provided. If the inclusion of an estimate for ascertainable damage under the word "loss" results in a double charge against the respondents for defective workmanship and materials, such double charge would only be included if, in calculating the credit amounts in favour of the respondents, the umpire had taken into account deductions for bad work or faulty material, and had in consequence of such deductions given the respondents something less than the full fair value to which they are entitled under para. 3 (*a*).

There is, however, no ground for any such assumption, and no evidence that the umpire has made the error attributed to him. Following the order prescribed in the submission, and adopted in the report, the umpire would consider first the debits. The suggestion is that after making a charge under the head of debits for all defective workmanship and materials, the umpire made a deduction of the same items in calculating the credits due to the respondents. It is not admissible to assume that the umpire made such a mistake, and no such mistake appears upon the face of the report. It is not immaterial that a proportion of the credits, under each item, was not determined by him, but agreed by the appraisers.

Curran J. and Cameron J.A. do not construe the terms of the submission in the limited sense adopted by the majority of the Court of Appeal. Curran J. expresses his opinion with some hesitation, but Cameron J.A. regards the terms of the consent judgment as amply wide enough to support the umpire's findings, and to include the item of estimate of expenditure necessary to complete the repair of caisson foundations. Their Lordships agree with Cameron J.A., and are unable to find, either in the conditions under which the agreement of submission was made, or in the context, or from the general scope of the agreement, any ground for limiting the words "all loss" to money loss, money out of pocket.

Has the umpire included in his report any items not within the terms of the agreement of reference as above construed? The report is a written document which speaks for itself and which cannot be interpreted, or varied, or contradicted, by extrinsic evidence. If there is any doubt as to the subject matter over which the umpire was purporting to exercise jurisdiction, evidence may be given showing what was the subject matter into which he was inquiring, in order to enable the Court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent witness; but it should be limited to the issue of fact, and, in the words of Lord Cairns, "is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument": *Duke of Buccleuch* v. *Metropolitan Board of Works.* (1)

In the present case the umpire sets out, in the report, separate items under the head of debits and credits. There is consequently no difficulty in determining from the language used in the award, without the aid of extrinsic evidence, the subject matter over which the umpire was exercising jurisdiction. He finds that the physical investigation made on the new parliament buildings did disclose the fact that caisson foundations were defective, and awards in respect thereof two items: (1.) portion of cost in repairing caissons up to February 28, 1917, $160,306; (2.) estimate of expenditure necessary to complete the repair of caisson foundations, $615,213. It is in respect of this latter item that the respondents have raised the issue of excess of jurisdiction. They base their objections on the allegation that the estimate is one not based on actual expenditure, and therefore not a "loss" to the appellant by reason of defective workmanship and materials within the meaning of para. 2 (*b*) of the consent judgment. The appellant on the other hand argues that a loss of this character is within the meaning of para. 2 (*b*), and therefore within the jurisdiction of the umpire. Their Lordships have already stated their opinion that the contention of the appellant as to the meaning of para. 2 (*b*) is correct, and it follows that there was no excess of jurisdiction on the part of the umpire in including this item in his award.

The respondents further, in the cross-appeal, question the item of the half cost of the Royal Commission. It was not argued at any length before their Lordships. All the judges in the Courts below, before whom the question has come, are unanimously of opinion that the item comes within the authority of the later portion of the proviso to para. 2 (*b*). In this opinion their Lordships concur.

[Their Lordships considered the evidence as to the alleged misconduct, and held that no misconduct had taken place; the judgment proceeded:]

It has been convenient to deal first with the special

---

(1) L. R. 5 H. L. 418, 462.

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA
v.
KELLY.

objections to the report based on misconduct and excess of jurisdiction. The more general objection is raised, that the report is against law, evidence, and the weight of evidence. It appears that this objection was argued at considerable length in the Courts below, but it occupied less time in the argument before their Lordships. The principles applicable in arbitrations, where there are no special statutory provisions, have long been established. The submission in the consent judgment contains a special term, that the appraisal, thereunder, shall not be subject to the provisions of the Manitoba Arbitration Act.

In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the Courts will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the Court to review his decision: *Holgate* v. *Killick* (1); *Fuller* v. *Fenwick* (2); *McRae & Co.* v. *Lemay* (3); *Adams* v. *Great North of Scotland Ry. Co.* (4); *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (5)

This principle is approved by Parke B. in *Phillips* v. *Evans* (6) on the ground that although, possibly, injustice may be done in particular cases, it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door for inquiry into the merits, as this might lead to such an inquiry in almost every case. In the present case the umpire has not admitted any mistake, and there is no error on the face of the report. There is a further consideration which arises in the case of the present report owing to the special provision, as to evidence, contained in the submission. The umpire is entitled to form his own opinion in respect of all matters submitted, from

(1) (1861) 7 H. & N. 418.
(2) (1846) 3 C. B. 705.
(3) (1890) 18 Can. S. C. R. 280
(4) [1891] A. C. 31, 39.
(5) [1912] A. C. 673.
(6) (1843) 12 M. & W. 309.

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA v. KELLY.

his own knowledge, inspection, or examination, or from such other source as he may deem proper. The effect of this provision is that it is not possible for the Court to have before it all the material on which the umpire based his decision, and that even if the Court should remit the report it could have no effective control over the ultimate decision.

The older cases are reviewed by Lord Halsbury in *Adams* v. *Great North of Scotland Ry. Co.* (1) The Lord Chancellor, referring to the judgment of Lord Thurlow in *Knox* v. *Symmonds* (2), said : "It shows that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. And in the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous, in deciding upon a question of law on demurrer, nevertheless held that the parties, having submitted that question to the arbitrator, it was for the arbitrator to determine it ; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts. In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions."

In the later case of *In re King and Duveen* (3) Channell J., after referring to the case of *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (4), said : "It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

---

(1) [1891] A. C. 31, 39.
(2) (1791) 1 Ves. Jun. 369.
(3) [1913] 2 K. B. 32, 36.
(4) [1912] A. C. 673.

J. C.
1922
ATTORNEY-GENERAL FOR MANITOBA
v.
KELLY.

The learned judge refers to *Stimpson* v. *Emmerson* (1) a case which had been referred to in *Adams* v. *Great North of Scotland Ry. Co.* (2) as a clear authority in favour of this view.

Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award; but no such issue arises in the present appeal. In *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (3) it was held that where an arbitrator had made an award expressed to be made on the basis of an erroneous opinion given upon a special case stated by an arbitrator under the Arbitration Act, 1889, in regard to questions of law arising in the course of the reference, the award is subject to appeal, if that opinion is erroneous.

In the course of his judgment Lord Haldane, the Lord Chancellor, said (4): "It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well-known case of *Hodgkinson* v. *Fernie* (5) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (5), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect, or that the decision in *In re Knight and Tabernacle Permanent Building Society* (6) is an authority for the proposition that it did. It is, therefore, competent for this House to review the law which the arbitrator, as he was bound to do, adopted from the Divisional Court and set out in his award."

The result is that the respondents fail to make good their objections to the report of the umpire or to any part thereof. The appeal succeeds and the cross-appeal fails. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and in the Court of Appeal, that the cross-appeal should be dismissed with costs, and that the judgment of Curran J. should be restored.

---

(1) (1847) 9 L. T. (O. S.) 199.
(2) [1891] A. C. 31.
(3) [1912] A. C. 673.
(4) [1912] A. C. 686.
(5) (1857) 3 C. B. (N. S.) 189.
(6) [1892] 2 Q. B. 613.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1922
Feb. 14.

EILEEN LOUISE NICOLLE . . . . . APPELLANT;

AND

JOHN WINTER NICOLLE . . . . . RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

Jersey—Testamentary Power—Immeubles acquêts—Devise to illegitimate Daughter—Custom of Jersey—Testaments d'Immeubles Règlement (*Jersey*), 1851, *arts.* 1, 3.

An inhabitant of Jersey, who died in 1919 a widower and without legitimate offspring, by a will disposing of his biens meubles left the residue of them to his illegitimate daughter; by a separate will he devised to her all his immeubles acquêts. An action was brought to set aside the legacy of biens meubles on the ground that the law and custom of Jersey prohibited a person from giving by will to his illegitimate child anything except maintenance (aliments), but the Royal Court (Inferior Number) upheld the legacy on the pleadings; an appeal was entered but abandoned. A Règlement of 1851, before which there was in Jersey no testamentary power over immeubles, enacted that a person capable of making a will of biens meubles, and having no descendants, could dispose by will of his immeubles acquêts, subject (by art. 3) to the beneficiary being capable of taking a legacy of biens meubles and of possessing immeubles. In a second action the devise of the immeubles acquêts was sought to be set aside as contrary to the custom of Jersey having regard to the devisee being the testator's illegitimate child:—

Held, that the Règlement of 1851 gave the testator power to dispose

---

* *Present:* LORD ATKINSON, LORD PHILLIMORE, and LORD CARSON.

J. C.
1922
Nicolle
v.
Nicolle.

of his immeubles acquêts to any person who satisfied the conditions provided by art. 3; that, having regard to the judgment establishing the validity of the legacy of the biens meubles, and the absence of any rule against a person of illegitimate birth possessing immeubles, the devisee satisfied those conditions; and that consequently the devise was valid.

Judgment of the Royal Court reversed.

Appeal from a judgment of the Royal Court of Jersey dated July 5, 1920.

The respondent, suing by his curator, as heir to the estate of Saumarez James Nicolle, a deceased inhabitant of Jersey, brought the present action against the appellant in the Royal Court (Inferior Number). He claimed to set aside a will whereby the said S. J. Nicolle had devised the whole of his immeubles acquêts to his illegitimate daughter, the appellant. He alleged that the law and custom of Jersey prohibited a father from giving any part of his héritage to his illegitimate child. The appellant by her pleading admitted the custom as an ancient custom of Normandy, but relied on Jersey Règlements of 1851 and 1901, and alleged that those Règlements applied since she was capable of taking a legacy of biens meubles and of possessing immeubles. The facts of the case and the relevant provisions of the Règlements appear from the judgment of their Lordships.

Owing to the importance of the case it was referred to the full Court, which by a judgment delivered on July 5, 1920, held that the will was invalid and of no effect. The judgment stated that the Court so held by a majority, but it did not state the reasons upon which the decision was based.

1921. Jan. 17. *Jenkins K.C.* and *C. A. Bennett* for the appellant. By the Règlement of 1851 the testator, having no lawful descendants, had power to devise his immeubles acquêts to any person who satisfied the two conditions provided by art. 3. The appellant satisfied both these conditions. The judgment as to the biens meubles established that she was capable of receiving a legacy of biens meubles, and it is not suggested that an illegitimate person cannot hold immeubles in Jersey. There is no inherent incapacity in an illegitimate preventing the holding of property; it was only gifts from the parent which the custom forbade: Basnage, Commentaries, art. 438. As there was no testamentary power over immeubles before 1851, there can be no custom affecting the matter. The terms of the Règlement are clear; the respondent seeks to read into art. 3 a condition which is absent. The decision in *Le Dain* v. *Messervy* (1), appearing in the record, shows only that the ancient custom still applies to gifts inter vivos; they however are not void but voidable.

Le Quesne for the respondent. When the Règlement of 1851 was enacted there was an ancient and well-established custom which prohibited a father from transferring part of his héritage to his illegitimate child: Terrien, Commentaries, Bk. 6, ch. 5 (5.) and ch. 7 (4.); Basnage, Commentaries, art. 278. The Règlement of 1851 first gave a testator power to dispose of his immeubles, if acquêts. In the absence of express words the Règlement should not be read so as to exclude the custom: *River Wear Commissioners* v. *Adamson* (2); *British and Foreign Marine Insurance Co.* v. *Gaunt.* (3) The prohibition still exists in regard to gifts inter vivos; it would be anomalous if it did not apply to gifts by wills.

Feb. 14. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The circumstances in which this appeal comes before their Lordships are the following: The late James Nicolle, an inhabitant of Jersey, had land (immeubles) in the island, some of which had descended to him, and the other part of which he had acquired in his lifetime. He had also considerable personal property, biens meubles. He died a widower and without legitimate offspring on September 20, 1919, having made two wills, one of his biens meubles and the other of his "biens immeubles tenant nature d'acquêts."

By the will, with a codicil, disposing of his biens meubles, which was duly proved in the Ecclesiastical Court of the Island, he left a number of legacies and the residue to "his daughter, Eileen Louise Nicolle." This is how she is described in the will. All their Lordships know further about her is that she was his illegitimate daughter. The validity of this residuary bequest was disputed by the next of kin, who pleaded "que la loi et coûtume de cette Ile défend à aucun de donner par testament à son enfant illégitime au delà des aliments." The suit came on for trial in the Royal Court before the Inferior Number, when a decision was given in favour of Eileen Louise Nicolle. An appeal was asserted but was abandoned, and no further question arises as to the will of biens meubles.

---

(1) Unreported. Royal Court, May 6, 1886.

(2) (1877) 2 App. Cas. 743, 764.

(3) [1921] 2 A. C. 41, 48.

By the will of immeubles he left his house at St. Heliers, which was an acquisition or "acquêt" and any other "héritages et rentes tenant nature d'acquêts" to Eileen Louise Nicolle, again described as his daughter and living in England.

The lawful heir of the testator, who at his death was his brother, died, leaving a son. An action was brought on behalf of this son as the heir, to quash and annul the will, as being "contre loi et usage qui défend à aucun de donner à son enfant bâtard aucune chose de son héritage." Eileen Louise Nicolle, in her defence, while admitting "qu'aux termes de l'ancien coûtumier de Normandie aucun ne peut donner à son fils bâtard aucune chose de son héritage," proceeded to point out that at that time no will of immeubles or héritages could be made, and to rely on a Règlement passed in 1851, the dispositions of which were extended by a Règlement of 1902. Under the terms of these Règlements (as she contended) not only was liberty given to dispose by will of such immeubles, but the liberty was absolute and unqualified.

The reply to this was to the effect that the liberty of testamentary disposition must be taken subject to the well-known provisions of the coûtume against dispositions in favour of illegitimate children.

The cause then came on for hearing before the Court of the

Inferior Number, but was, by reason of its difficulty, referred to the Full Court, which, on July 5, 1920, by a majority decided against the validity of the dispositions; and it is from this decision that Eileen Louise Nicolle has appealed to His Majesty in Council, the original respondent to the appeal being the heir, acting by his curator.

It may be the case that at one time by the ancient coûtume dispositions of biens meubles in favour of illegitimate children could not extend beyond an alimentary or maintenance grant, but that this is no longer the law of the island seems clear by the decision given in the case of the same parties in the contest on the validity of the residuary bequest in the will of biens meubles. As has been already said no question could have arisen under the coûtume as to the validity of a testamentary disposition of immeubles, because there was no power of testamentary disposition at all, as there is still no power of disposition of immeubles propres, that is which have come to the deceased by descent except in certain cases. It is admitted on behalf of the appellant that as regards dispositions inter vivos there was a fetter in respect of illegitimate children, that a man could not give or sell or even mortgage in favour of an illegitimate child. This rule, however, can hardly be stated absolutely, but must be taken in the way in which it would be worked out. The disposition inter vivos was not void, but only voidable. The heirs of the giver had a year and a day after his death within which to impeach the disposition; if they did not use this opportunity, the disposition stood.

This being the state of the law before the Règlement of 1851 their Lordships have to consider this Règlement, and in doing so, to pay full respect to the condition of the law as it stood, so that no further change be made in the previous law of the island than such as the new Règlement fairly considered will make.

The preamble of this Règlement is as follows:—

"Considérant qu'il est utile de permettre aux propriétaires n'ayant enfans ni autres descendans, de disposer de leurs immeubles par testament: Les États ont adopté le Règlement

J. C.
1922
NICOLLE
v.
NICOLLE.

suivant, pour avoir force de loi, moyennant la sanction de Sa Très Excellente Majesté en Conseil :—

"Du Droit de Léguer des Immeubles.

"Art. 1. Toute personne ayant capacité pour faire un testament de biens meubles, et ne laissant enfans ni autres descendans, pourra disposer par testament des immeubles suivans, savoir : 1. De ses acquêts. 2. De ses propres, s'ils ne descendent d'aucun ancesseur de ses héritiers.

"Art. 3. Les dispositions testamentaires d'immeubles pourront être faites au profit de toute personne qui aurait droit de recueillir un legs de biens meubles fait par le testateur, et qui peut possèder des héritages dans cette Ile."

The Règlement then provides that these provisions are to be without prejudice to the rights of a widow to dower, or of a surviving husband, to tenancy by courtesy, or to the feudal rights of the Crown and the Lords of fiefs, or to the rights of the Dean to require probate of any will which contains a bequest of biens meubles. And then by art. 30 : "Nos lois et coûtumes touchant les testaments de biens meubles, en ce qu'elles ne sont point contraires aux dispositions de ce Règlement, seront applicables aux testaments d'immeubles."

To this it should be added that by the Règlement of 1901 the power of testamentary disposition was extended to the case where the deceased left children or other descendants.

The language of these two Règlements is wide and general. Special attention should be called to art. 3, which states the terms under which the devisee is to be capable to take. Every person who could receive a legacy of biens meubles or who is capable of possessing héritages or immeubles in the island is made capable.

As regards the second condition, their Lordships were referred to a decision cited in the record in the case of *Beakbane* v. *Beakbane* (1), given on December 8, 1915, where a devisee was a citizen of the United States and was held for this reason not to be "habile à recueillir et posséder des immeubles dans cette Ile." It is not necessary to express any opinion about this decision, because the appellant would not come within it. There is no rule that a person of illegitimate birth cannot hold immeubles.

---

(1) Royal Court. Unreported.

Then comes the first qualification. Any person is capable of profiting by a disposition of an immeuble who could receive a legacy of biens meubles. It might have been said at one time that the language of the coûtume rendered an illegitimate child incapable of receiving such a legacy if it extended beyond maintenance. But since the decision as to the validity of the residuary bequest in the will of biens meubles in favour of the appellant, unappealed from, it is not possible for the respondent to contend that if this was the ancient coûtume of Normandy it had not become altered in time or that the appellant was not now capable of receiving a legacy of biens meubles from her father.

This being so, the language of art. 3 seems precisely applicable to the present case. It was contended before their Lordships that this view of the law would create an anomaly. An illegitimate child would still remain incapable of taking immeubles from his or her putative father by gift inter vivos, while becoming capable of taking under a will. The anomaly, however, is not so great as it seems at first sight. The gift inter vivos, as already said, is voidable only, and not void. It has not been suggested to their Lordships that the giver could himself avoid it, and if it be the law that he could, he is not very likely to do so. So if he intends the gift to be absolute and not voidable by his heirs he would only have to avail himself of arts. 1 and 3 and confirm the gift by a devise under his will.

What then remains ? It is no doubt a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases of which the particular law is but one. This as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute as in *Hawkins* v. *Gathercole* (1); *Seward* v. *Vera Cruz* (2); or be the underlying common or customary law of the country: *Heydon's Case* (3); *River Wear Commissioners* v. *Adamson.* (4)

To quote from the *Vera Cruz Case* (2): "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . . that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

But this argument, which would have much force if the Règlement contained only art. 1, loses its strength when reference is made to art. 30 and above all to art. 3; and without refusing all weight to the considerations to which it gives rise, their Lordships cannot hold that the plain language of art. 3 is to be restricted in the way for which the respondent contends.

Their Lordships think that the effect of the Règlement of 1851 is that the power thereby bestowed on testators extends not merely to enable them to bestow their acquired immeubles by will, but also to dispose of them to any person capable of receiving biens meubles by legacy, and fulfilling the second condition, and that the appellant is such a person and is therefore capable of receiving the immeubles devised to her by her putative father's will.

Their Lordships will humbly recommend His Majesty that the sentence of the full Court of the Royal Court of Jersey should be reversed, and that it should be declared that the testament d'immeubles of the late Saumarez James Nicolle is valid and operative.

Their Lordships while allowing the appeal think that it is right to follow in respect of costs the principle adopted in this case by the Royal Court; and that as the point is a new one the costs of appellant and respondent should come

---

(1) (1855) 6 D. M. & G. 1.
(2) (1884) 10 App. Cas. 59, 68.
(3) (1584) 3 Rep. 7*a*.
(4) 2 App. Cas. 743.

J. C.
1922
NICOLLE
v.
NICOLLE.

out of the estate of the deceased, or in the language of the judgment of the Royal Court "seront tous les frais du procès prélevés sur la masse de la succession," and their Lordships will humbly recommend His Majesty accordingly.

Solicitors for appellant: *Bennett, Ferris & Bennett.*
Solicitors for respondent: *Cameron, Kemm & Co.*

Applied. THE HERMES [1951] P. 347

[PRIVY COUNCIL.]

J. C.*
1922
Feb. 13.

THE PELLWORM AND OTHER SHIPS.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Enemy Ships—Capture in Neutral Territorial Waters—Test of Capture—Hauling down Flag—Requisition Order—Requisitioned Ship sunk by Enemy Action—Appraised Value—Rights of Neutral Government—Prize Court Rules, 1914, *Order xxix.—Treaty of Versailles, Pt. VIII., annex III., art.* 1; *art.* 297, *art.* 440.

Capture consists in compelling the vessel captured to submit to the will of the captor. Hauling down the flag by a merchant ship, even in conjunction with stopping her engines as ordered, is not an unequivocal act of submission.

Four German ships were captured in Dutch territorial waters, the violation of neutrality being inadvertent. The ships were requisitioned for the use of the Crown under an order of the Prize Court made under Order XXIX. of the Prize Court Rules, 1914, upon the usual undertaking to pay the appraised values into the Prize Court. Two of the ships while so requisitioned were sunk by German submarines. By the Treaty of Versailles, made at the conclusion of the war, Holland not being a party thereto, Germany recognized the validity of orders of the Prize Court, and made to the Allied and Associated Powers certain cessions of ships and of other property of German nationals in the territories of those Powers. On a claim by the Dutch Government for restoration of the ships to Dutch waters, or for their appraised values, with compensation for their user:—

Held, that the Dutch Government was entitled to have the two ships which remained afloat returned to Dutch waters, free of expense, and to receive the appraised values of the two sunken ships, but not compensation for user of the ships; and that the above stated rights of the Dutch

---

* *Present:* LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

Government in the Prize Court were not affected by the provisions of the Treaty.

A requisition order, unlike a decree for condemnation, is not a judgment in rem; it does not purport to affect the property in the ship or goods.

The Düsseldorf [1920] A. C. 1034 and *The Valeria* [1921] 1 A. C. 477 applied.

Judgments of the Prize Court [1920] P. 347 varied.

CONSOLIDATED APPEAL and CROSS-APPEALS from two decrees of the Admiralty Division (in Prize) dated July 30, 1919, and April 21, 1920. (1)

On July 16, 1917, four German merchant ships—namely, the *Pellworm*, *Breitzig*, *Marie Horn*, and *Heinz Blumberg*—were captured off the coast of Holland by British destroyers, and were taken to England for adjudication before the Prize Court. Writs for condemnation as prize were issued on July 25, 1917. On July 31, 1917, orders were made by the President (Sir Samuel Evans), under Order XXIX. of the Prize Court Rules, 1914, giving liberty to the Procurator-General to requisition the four ships for the use of His Majesty, and they were accordingly requisitioned. Undertakings were given by the Procurator-General under r. 4A of the Order "for payment into Court on behalf of the Crown of the amounts fixed by the Court, at such time or times as the Court shall declare by order that the same, or any part thereof, is required for payment out of Court"; the values were subsequently appraised. The *Pellworm* and the *Marie Horn*, while so requisitioned, were sunk by German submarines in October, 1917, and May, 1918, respectively.

In February, 1918, claims were filed by the Dutch Government alleging that the four ships had been captured within the territorial waters of Holland.

The action was tried by the President (Lord Sterndale), who, by his judgment delivered on July 30, 1919 (1), found that the ships, though outside territorial waters when called upon to stop, were within them when the captures were effected; he held that there had been no intentional violation of Dutch territorial waters. He refused to condemn the ships, rejected the claim for costs and damages, and adjourned further consideration.

---

(1) [1920] P. 347.

The State of Netherlands (hereinafter referred to as the Dutch Government), on March 18, 1920, delivered particulars of their claim whereby they claimed: (1.) that the ships should be restored within the territorial waters of Holland in the like condition as at the time of capture, or alternatively with compensation for any loss or depreciation; (2.) compensation for the user of the ships under the requisition order; (3.) if any of the ships have been lost during their user by His Majesty, or otherwise, they claimed the insurance effected thereon; or (if not fully insured) a sum representing its full value at the date of loss.

The Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on June 28, 1919, was ratified after the hearing before Lord Sterndale P. It contained the following provisions material to the arguments. By Part VIII., annex III., art. 1, Germany ceded to the Allied and Associated Powers the property in all German-owned merchant ships of 1600 tons gross and upwards, and an unascertained moiety of certain ships of less tonnage. By art. 297 the Allied and Associated Powers reserved the right to retain and liquidate all property and interests belonging at the date of the coming into force of the Treaty to German nationals. By art. 440 Germany recognized the validity decrees and orders made by the Prize Court.

Of the ships in question the *Heinz Blumberg* only was of over 1600 tons gross.

The further hearing took place before Sir Henry Duke P., who, by his judgment delivered on April 21, 1920 (1), held as follows: that the seizures in territorial waters created no proprietary interest in the Dutch Government; that the claim by the Dutch Government was merely on behalf of the German users; that having been requisitioned the ships became the property of the Crown, and for all purposes of prize jurisdiction were represented by their appraised values; that the subject-matter of the claims being the beneficial interest in

(1) [1920] P. 347.

sums of money belonging to German nationals, these sums fell within art. 297 of the Treaty and must be retained; and accordingly that the claim of the Dutch Government must be dismissed.

The Procurator-General appealed from the decree of July 30, 1919, so far as it determined that the ships were captured within Dutch territorial waters. The Dutch Government appealed against that decree so far as their claims for damages and costs were rejected; they also appealed from the decree of April 21, 1920, rejecting their claims for restoration of the ships, and compensation for their user, and ordering the appraised values to be retained in Court to be dealt with pursuant to the Treaty. All the appeals were consolidated.

1921. Oct. 18, 20, 21. *Dunlop K.C.* (with him *Sir Ernest Pollock S.-G.* and *Aspinall K.C.*) for the Procurator-General (appellant). The ships were not within the territorial waters of Holland when they were captured. Lord Sterndale P. found that they hauled down their flags and stopped their engines while outside the neutral limit. Those acts amounted to an unequivocal surrender. At that time the ships were at the mercy of the destroyers, which could have sunk them if any intention to avoid capture had been shown. It is not material that the ships afterwards drifted, or passed by their momentum, into the neutral waters. [Reference was made to *The Vrow Anna Catharina* (1); *The Anna* (2); *The Rebeckah* (3); *The Esperanza*. (4)]

R. A. Wright K.C., *Bisschop*, and *A. T. Bucknill* for the Dutch Government. The Crown's appeal against the finding that the ships were captured within Dutch territorial limits should be dismissed. There was no surrender outside the territorial limits; the hauling down of the flags was preparatory to flight, not an act of surrender. But even if the ships surrendered outside the limit, possession was taken inside it. That was an act of war which was a violation of neutral rights: *The Adela*. (5) [Reference was also made to *The Edward and*

---

(1) (1803) 5 C. Rob. 15.
(2) (1805) 5 C. Rob. 373.
(3) (1799) 1 C. Rob. 227, 233.
(4) (1822) 1 Hag. Adm. 85, 91.
(5) (1867) 6 Wall, 266.

Mary (1); Oppenheim's International Law, 2nd ed., vol. ii., § 184; Taylor's International Public Law, 1901, § 554, p. 569.]

Upon the first cross-appeal: The Dutch Government made immediate complaints through diplomatic channels, and were referred to the Prize Court. The Crown therefore cannot oppose the right of the State to the costs.

Upon the second cross-appeal: The Dutch Government is entitled to have the two ships which remain afloat restored to Dutch waters, free of expense, that is clear from *The Düsseldorf.* (2) The principles there laid down show that the Dutch Government is entitled also to the appraised values of the two ships sunk as a restitutio in integrum. *The Valeria* (3) is distinguishable; that ship was sunk before she was brought in; in the present case the two ships were sunk while in the use of the Crown, and are now represented by the appraised values. The requisition order did not transfer the property to the Crown; it did not purport to do so. In *The Düsseldorf* (2) the ship had been requisitioned, but no change of ownership was suggested. The right of the neutral sovereign in the Prize Court cannot be taken away by an order made before the right is asserted. The view that the claim to the ships is made as trustee for the German owners is erroneous. The question is not really one of property, but of vindicating the rights of a neutral sovereign by a restitutio in integrum: *The Valeria.* (4) The rights of the Dutch Government are not affected by the Treaty, to which it was not a party. The duty of the Prize Court is to decree that the ships, or the appraised values, be handed over, whatever the effect of the Treaty may be. In any case the Treaty does not purport to transfer the ownership of ships of under 1600 tons gross. Nor is art. 297 applicable; first, because owing to the capture the ships had ceased to be German property: see Wheaton (Dana's edition), note 209; secondly, because the property was in British territory wrongfully, and is to be treated as being in Dutch territory.

(1) (1801) 3 C. Rob. 305, 307.
(2) [1920] A. C. 1034.
(3) [1921] 1 A. C. 477.
(4) Ibid. 481.

Sir Ernest Pollock S.-G. (with him *Aspinall K.C.* and *Dunlop K.C.* for the Procurator-General), as respondent to the cross-appeals. The finding that there was no intentional violation of Dutch neutrality precludes a right to costs or damages: *The Düsseldorf.* (1) That case also shows that the claim to compensation for user of the ships cannot be maintained. The Dutch Government is not entitled to the restoration of the ships, or to receive their appraised values. In a claim of territory the right is merely to have the res handed over; the neutral sovereign, however, has no property or interest in it: *The Valeria.* (2) If for reasons binding on the Prize Court the res cannot be, or ought not to be, handed over the neutral sovereign is entitled only to a decree declaring that the capture was made in his territorial waters. That was the decree made in *The Valeria* (3), which was affirmed; it is the appropriate decree in this case. To that extent it is conceded that the decree made should be varied. The Prize Court in this case cannot hand over the res since by its orders already made, which were recognized by Germany by art. 440 of the Treaty, it has permanently requisitioned the ships to the Crown; and it ought not to do so having regard to the other provisions of the Treaty of Versailles. The effect of art. 297 of the Treaty, and of Part VIII., annex III., art. 1, is that the property is ceded to Great Britain. The effect of the provisions for cession to the Allied and Associated Powers is that each Power is entitled to the German property in its territory. The Peace Treaty Order in Council declared that the scheduled portions of the Treaty, which included art. 297, were to have the effect of law: see *The Zamora* (4). *The Valeria* (2) draws a distinction between the right to the res, and the right to a solatium in money; the claim to the appraised values is in effect a claim to a solatium. Further, if the appraised value represents the res, the loss of the res, which was held in that case to be an answer, is equally an answer to a claim to the appraised value.

Wright K.C. replied on the cross-appeals.

(1) [1920] A. C. 1034, 1041.
(2) [1921] 1 A. C. 477, 481.
(3) [1920] P. 81, 89, 90.
(4) [1916] 2 A. C. 77, 99.

J. C.
1922
THE PELLWORM.

1922. Feb. 13. The judgment of their Lordships was delivered by

LORD SUMNER. These are consolidated cross-appeals from decisions of Lord Sterndale and of Sir Henry Duke. In the Prize Court, when the Procurator-General claimed the condemnation as good prize, of four German steamships, the *Pellworm*, *Marie Horn*, *Breitzig*, and *Heinz Blumberg*, seized on July 16, 1917, Lord Sterndale found that they had been captured in Dutch territorial waters and refused condemnation, but at the same time he dismissed the claim for damages put forward by the Dutch Government and adjourned further consideration. This was in 1919. When the matter came on again, Sir Henry Duke dismissed the claim for delivery up of the ships or their appraised values, ordered that the latter be retained in Court to be dealt with pursuant to the Treaty of Versailles, and directed that consideration of the claims to the cargoes should be reserved for further inquiry. Accordingly their Lordships are not concerned with the cargo claims and do not deal with them. The Procurator-General has appealed against the decision that the captures were made within the territorial waters of Holland and against the refusal to condemn the ships, and there is a cross-appeal by the Dutch Government against the refusal to order their delivery, or payment of their appraised values, with damages and expenses.

The facts were that a flotilla of British destroyers was proceeding along the Dutch coast at no great distance outside the three-mile limit, on the look out for a number of German vessels, which were also shaping their course as near as they could to that limit, obviously for the purpose of effecting a quick escape into neutral waters in case a British patrol should heave in sight. The destroyers did heave in sight, and closed. The German ships made for Dutch waters, but eventually were signalled to stop their engines and change course to the westward at a moment when they were within too short a range to make it safe to disobey. They hauled down their flags and stopped or appeared to stop their engines, but did not alter course to the westward. The wind and tide were then from the north-west, though of no great strength, and the steamers continued to keep their way and, aided by wind and tide, drew nearer to the shore. The destroyers then sent in their boats. Some of the German steamers were abandoned by their crews. When boarded, as they all eventually were, they had travelled a considerable distance towards the coast of Holland, but no resistance was made, and the prize crews took them out to sea and brought them into an English port.

The questions of fact arising in connection with this story are these: (1.) Were any of the German steamers within the three-mile limit: (*a*) when ordered to stop their engines; (*b*) when they hauled down their flags and purported to stop their engines; (*c*) when they were abandoned by their crews; (*d*) when they were boarded and taken possession of by the prize crews? (2.) If any belligerent act was committed by the British forces within the territorial waters of Holland, was it done intentionally or in the belief that both the British and the German ships were still outside the territorial limit?

The learned President, Lord Sterndale, answered the first of these questions in the following words: "The conclusion to which I come on the evidence is that the German vessels were outside the territorial limit when sighted and signalled to stop, and were close upon it, if not within it, when they stopped, but were well within it when a boarding party was put on board and possession actually taken of them."

After carefully examining the evidence with the assistance of counsel, their Lordships have arrived at the same conclusions. It is unnecessary to recapitulate the particular facts deposed to, or to discuss them in detail, but their Lordships may observe generally: (1.) that the German ships, when boarded, were far enough inshore to make it impossible that they should have been first brought to at any considerable distance from the territorial limit; (2.) that the wind and tide and the way the ships were carrying were hardly sufficient in themselves to account for the distance which they eventually covered towards the land, but their Lordships are not to be taken to assert (whatever they may suspect) that, after the order to stop, the engines were kept running, though with calculated unobtrusiveness; and (3.) that, whatever may be the effect of it in law, the German steamers in fact disregarded the signal to alter their heading, in order to profit by the forces, natural or artificial, which were seen to be carrying them towards the land. No doubt the contingency of meeting English men-of-war had been carefully considered, for the German vessels, which were all following one another en échelon, all promptly acted in the same way and with the same results. It is true that in his evidence one of His Majesty's officers surmised that the signal to alter course to the westward was not readily understood, but no German captain says so, and their Lordships think that the surmise does less than justice to the vigilance and intelligence of the enemy.

The claimants' proof that possession was finally taken well within the territorial waters of Holland makes it incumbent on the captors to establish affirmatively at least that capture was legally complete while both the captors and the captured were still outside of them. Whether or not, in these or any circumstances, a prize, duly captured outside the three-mile limit, but carried intentionally or by accident or inadvertence across the line before she can be boarded, may nevertheless be legitimately followed up and reduced into possession within the line is a question which need not now be decided. There are observations on the subject by Sir William Scott in *The Anna* (1) when discussing the dictum of Bynkershoek in his "Quæstiones Juris Publici," p. 66; but, besides being unnecessary to the decision in that case, they do not apply to such a case as the present, where the neighbouring shore was inhabited and the actual field of operations was under observation by Dutch officials, stationed there for the very purpose. Such a case bears no analogy, at any rate, to salving a prize, which, after being duly captured, has broken adrift or has otherwise by marine perils come involuntarily within the three-mile limit, a contention advanced by the Procurator-General's counsel. Boarding the prizes within Dutch waters was a belligerent act in any view, and thereafter and in consequence of the boarding, the German ships were taken as captured prizes out of those waters to British ports. It was not contended that this action could be justified, if what had already been done on the high seas did not amount to capture; but the case for the Crown was that a complete deditio had taken place outside the territorial limit.

---

(1) 5 C. Rob. 373, 385 *d*, *e*.

When completed captures are made on the high seas, it can rarely matter by what steps they become complete or in what the conclusive indicia of capture consist. The question, however, becomes material when a series of naval movements take place in such a position that the invisible limit of territorial waters intersects them, for this at once creates the necessity for a logical analysis of them, in order to determine whether or not territorial rights have been violated. Singularly enough, the reported cases on claims of territory throw little or no light on this question. The Scottish prize cases, some of very early date, which are reported in Morison's Dictionary of Decisions, generally turn on circumstances so special as to be of little assistance in solving modern problems. There is one case of a claim of territory by the King of Denmark—namely, *Hunter* v. *De Bothmer* (1)—but there the whole capture was deliberately made within the waters of Norway. The cases before Sir William Scott are of limited application in any case, and do not touch this particular point, nor is it determined by any of the decisions of their Lordships' Board in the recent war. In the unreported case of *The Loekken* (2), which alone approximates to the present case, it was shown upon the facts that, when in response to a signal to stop and another threatening to fire if she did not stop, the *Loekken* stopped and reversed, both she and the captor were outside territorial waters, and she was thus captured on the high seas. It was further shown that, when the captors commenced to head her off from escaping into territorial waters, as she tried to do, they were themselves on the high seas, and if the two vessels afterwards drifted accidentally over the line, which was at best doubtful on the facts, this happened at a considerable interval after the completion of the capture.

---

(1) (1764) Mor. Dict. 11,957.

(2) J. C., July 26, 1918.

In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done deditio is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary: *The Esperanza.* (1) A ship may be truly captured, though she is neither fired on nor boarded (*The Edward and Mary* (2)), if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any rate taken as prize when resistance has completely ceased. It was contended before their Lordships by counsel for the Crown that hauling down the flag was conclusive in the present case, or at least was conclusive when taken in conjunction with stopping the engines as ordered. It was said to be an unequivocal act of submission, as eloquent as the words "I surrender" could have been, an act which could not be qualified by any intention that did not find expression in action. This is to press *The Rebeckah* (3) beyond what it will bear, for there the facts showed that, after the act of formal submission by striking colours, there was no discontinuance of that submission either effectively or at all, whereas Sir William Scott intimates that, if any attempt had been made to defeat the surrender, he would not have treated the deditio as complete till possession was actually taken. It is true that by tradition, when ships are engaged

---

(1) 1 Hag. Adm. 85, 91.

(2) 3 C. Rob. 305.

(3) 1 C. Rob. 227.

J. C.
1922
THE PELLWORM.

in combat, striking the colours is an accepted sign of surrender, but to do so without also ceasing resistance is to invite and to justify further severe measures by the victorious combatant. In the case of a merchantman, where the traditions of commissioned men-of-war are not of equal application, the hauling down of the flag, like any other sign or act of submission, is to be tested by inquiring whether the prize has submitted to the captor's will. What a combatant seeks to intimate by acts signifying surrender is first and foremost that he ceases to fight and submits to be taken prisoner; what a merchantman intimates is that she means to do as she is told, and that the chattel property may be captured in prize though the seamen in charge of it are not made prisoners or placed under personal restraint. In the present case, according to evidence given for the Crown, the hauling down of their flags by the German steamers was accompanied by a change of course towards the land, and, as it preceded any British signal by flag or cannon shot, it was in the circumstances anything but a clear intimation of submission. On the contrary, it is obvious that the German ships continued to move towards and shortly crossed the three-mile limit, and that this was neither inadvertent nor was incapable of being prevented. They had not abandoned the intention to escape, nor had they arrested their movement towards the region of safety. They submitted just so far as to minimise the risk of being fired on; they disobeyed orders just so far as to ensure that the ships would of themselves glide or be carried over the line. They were already heading towards the territorial waters, and desired to obtain whatever advantage might be derivable from getting within them. This was why they did not obey the order to alter course to the westward. It is not shown that they could not have done so. Under these circumstances their Lordships see no reason to differ from Lord Sterndale's conclusion, that the vessels were not captured till they had entered Dutch waters, for up to that time they were endeavouring to escape and were resisting or evading submission to the captors' will.

Nor can they differ from his conclusion that the conduct of His Majesty's officers was neither reckless nor careless, and that their violation of Dutch neutrality was inadvertent, since they believed in all good faith that both captors and prizes, throughout and until capture was complete, remained outside the three-mile limit. He saw these officers and judged of their demeanour, and their evidence is quite consistent with his conclusion. It may well be that they were keen in pursuit and determined to make a capture, if it could legitimately be made, but their minds were alive to the question of the rights of Holland, and they are not shown to have allowed meritorious zeal to degenerate into determination to snatch success at all costs. Even if it be taken, that when the German vessels were actually boarded they, or some of them, were obviously within Dutch waters and should have been known to be so by the captors, their Lordships do not think that this alone is a ground for reversing Lord Sterndale's decision apart from the other features of the case, nor indeed were they really pressed by counsel to do so. They are not to be taken to mean that ignorance of the law would excuse improper action, where the facts were or ought to have been known; but it is one thing to say that capture, effected within Dutch waters by boarding or otherwise, involves the restoration of the prize, and quite another to say that to board within the territorial limits a prize honestly believed to have been captured outside them must necessarily justify a claim for damages by the neutral sovereign concerned. It is not shown that the act of shelling other ships, which went ashore in another part of the area of operations, was connected with the capture of the vessels in question, in any way that ought reasonably to affect the matter. The further contention that a promise to pay costs and expenses can be inferred from a suggestion made in the course of diplomatic correspondence, that the whole matter was one for the Prize Court, is really not worth examination. When, therefore, the case again came up to be dealt with by Sir Henry Duke on Lord Sterndale's findings, it followed that there could be no award of damages in favour of the Dutch Government, but prima facie they were entitled to restoration of the ships, which had been wrongly captured within their territorial waters.

Here arise two classes of difficulty. After being brought before the Prize Court, all four ships were duly requisitioned for the use of His Majesty by Order, dated July 31, 1917, but made before the Dutch Government had entered an appearance. As to the claim for profits and usufruct, it was not nor could it have been seriously contended, that they were entitled to the profits of or to payment for the use of the ships, but while requisitioned two of them—the *Pellworm* and the *Marie Horn*—were torpedoed and sunk by enemy action, and subsequently, under the Treaty of Versailles, Germany ceded to the Allied and Associated Powers all German ships of 1600 tons gross and upwards, and undertook to cede an unascertained moiety of certain ships under 1600 tons. It was accordingly urged before Sir Henry Duke and again before their Lordships that, as the *Heinz Blumberg* at any rate is over 1600 tons gross, and both she and the *Breitzig* are ships in the hands of His Majesty's Government under an order of the Prize Court, which by art. 440 Germany undertakes to recognize as valid, the Treaty operated as if there had been a private cession of the property in the two vessels by the German owners to new proprietors; that under the Treaty the seizing Power had thus acquired an independent title, arising out of matters subsequent and not grounded in any wrongful act or involving the retention of any profit due to that wrong; that the former owners, having now no interest, could have no cause of complaint against the Dutch Government, and that the Dutch Government being immune from claims had neither occasion nor right to demand redelivery of the vessels. It was urged, on the other hand, on behalf of the Dutch Government, that not only were they entitled to redelivery of the ships which survive, but of the appraised values of those which have been lost; and that being strangers to the Treaty of Versailles, they were entitled to treat it as irrelevant and res inter alios acta.

Their Lordships have already stated in *The Düsseldorf* (1)

(1) [1920] A. C. 1034.

J. C.
1922
THE PELLWORM.

and *The Valeria* (1), and need not now repeat, what is the general position of a sovereign claimant, whose territorial waters have been violated by a belligerent force. In their opinion it follows from that position that changes in the ownership of the vessel, which is the subject of the proceedings in prize, cannot defeat the claim of territory, which is independent of ownership, but that on the other hand, where there has been no intentional misconduct or affront on the part of the captors, and the loss of the vessel in question, without default on the part of those in control of her, has made her return in specie impossible, the payment of damages to the claimant is a wholly inappropriate remedy. A separate and much more difficult question, however, arises where prizes have been requisitioned on the terms of bringing, or of undertaking to bring, the appraised values into Court. It is this : Ought a claim to those appraised values, advanced on behalf of the neutral sovereign, to be treated as a claim for a solatium in money or as a claim for the res itself, in the only form in which it can now be returned ?

In the first aspect the following arguments arise. Where, under orders regularly and lawfully made, money has been substituted for the res, which has been brought into prize, the substitution is ordered not only to secure the captors, but also for the benefit of such claimants as have a right of property in the res, and whose interest in it is therefore an interest in its value. A claim to the appraised value is a proprietary claim ; a claim by a sovereign in virtue of his violated rights is the antithesis of a proprietary claim, and finds its sole satisfaction in the return of the res to enable him to assert his rights as a sovereign and to discharge his duties as a neutral. The affronted Power had no property in or possession of the ship seized, and cannot assert a claim merely on behalf of or for the benefit of those who have the ownership or are entitled to the possession. The remedy for taking away the prize from neutral waters, without justification or permission, is the restoration of that which was seized to the waters, whence it was taken, as honourable amends for a belligerent act, which, when once it has been established, a friendly Power cannot seek to profit by or to defend. An offer of money, so far from constituting amends, would rather aggravate the affront; a claim of money, in the absence of misconduct on the part of the captors, could only be a claim in the interest of private owners, which the aggrieved sovereign is not entitled to make. Money was not taken, therefore money has not to be returned. The State, whose officers have captured the prize in neutral waters, cannot retain it consistently with the satisfaction of its obligation to make amends; but the State whose waters have been invaded cannot ask, nor can a Court of Prize grant, the imposition of a money penalty, where no intentional wrong was done, or decree the payment of money as the price of an invasion of sovereignty. In their Lordships' opinion these considerations, which are generally valid, fail to apply in the present case for the following reason. The ships were requisitioned by the Admiralty for the use of His Majesty, but ex hypothesi the requisition operated on something which never should have been brought into the custody of the Prize Court at all. Had it not been for the requisitioning, they would have been restored by decree of the Court. It is true that there is no claim for compensation in respect of the loss, as such, but the requisitioning was ordered at the instance of the Crown and the Court parted with the custody of them in accordance with the regular practice. Thereafter the ships were represented for all ordinary purposes by their appraised values. If a requisitioned ship is condemned, the undertaking to bring her appraised value into Court fails, since the Crown is not bound to pay for her; if she is not condemned, the money is brought into Court and paid to the party entitled to a release of the ship. If the Court were to refuse to release the appraised values in this case when it would have released the ships, if they had remained in the Marshal's custody, the result would be that the Dutch Government's right to restoration would be defeated merely as a consequence of the British Government's exercise of the right to requisition, and the British Government's obligation to bring the appraised values into Court would cease to be performable. As it is, though the ships are lost there is something to restore—namely, the money which represents them. In their Lordships' opinion this consideration must prevail. It is not a sufficient objection to say that the Dutch Government have no proprietary interest in money, or that they would recover money only as trustees for or for the benefit of ex-enemy owners. Trustees in strictness they are not, but, even if they were, this would in their Lordships' opinion be less incongruous with principle and more consistent with international amity than that the same law which requires the return of a prize wrongly captured should justify the retention of the sum which is to be deemed to be in Court as representing it. If the prospect of the return of the restored ships to their ex-enemy owners does not prevent their restoration to the neutral Government, no different result should follow from the prospect that the money, when restored, will be handed over likewise. It follows that His Majesty's Government ought to return to the waters of Holland the vessels which survive, let the present rights of property or possession be what they may; and ought to do so free of expense to the Government of the Queen of the Netherlands, and that the like obligation to return applies to the appraised values, which otherwise would be a profit growing out of their own wrong.

---

(1) [1921] 1 A. C. 477.

Accordingly, in this appeal, their Lordships refrain from expressing any opinion as to the effect of the Treaty of Versailles on the ownership of the *Breitzig* and the *Heinz Blumberg*, or the title to the sums representing the appraised values of the *Pellworm* and of the *Marie Horn*.

It is true that the general practice has been to use the same form of order—namely, " decreed the same to be restored to the said claimant for the use of the owners and proprietors thereof," both in cases of claims of territory and in cases of claims made by and on behalf of private owners, but this has not been followed without exception; for the order made in *The Düsseldorf* (1) was for release to solicitors, acting " on

---

(1) [1920] A. C. 1034.

J. C.
1922
THE PELLWORM.

behalf of the said claimant"—namely, the Norwegian Consul-General as representing his Government, and the owners were not mentioned. In either case, however, there is no precedent for an order seeking to fetter the possession of the State, whose claim has been successfully asserted, or to derogate from the full measure of the amends, which the Court of Prize has decided to be due. There appears to be no such settled practice as would affect the principle of the matter. On the other hand, it is necessary to correct the decree actually made by Lord Sterndale to this extent. The questions arising on the effect of the Treaty of Versailles had not at that time been mooted, and accordingly the decree as drawn up declared in ordinary form that the ships captured belonged to the enemies of the Crown. Now that these questions have arisen, their Lordships think that, to prevent any appearance of prejudging them, the words "at the time of capture" should be inserted after the word "belonged." If the right of His Majesty's Government to the property in and possession of those ships or sums by virtue of the Treaty of Versailles or otherwise is plain, their Lordships cannot doubt that the Government of the Netherlands will promptly recognize the right of a friendly sovereign and direct their return to this country. If it is susceptible of doubt, they make no question of the competence and freedom of the Courts of Holland to decide it in proceedings properly commenced for that purpose, or of the willingness of the Dutch Government to abide by their decision, and, pending that decision, merely to retain possession of the ships and sums on behalf of whom it may ultimately prove to concern. It would be little consonant with the principle of honourable amends between friendly Powers, which is the foundation of claims of territory, to clog it with any distrust of the justice and regularity of the proceedings of the successful sovereign. They find nothing in the Treaty, or in the Statute and Order in Council framed to make it executory, to interfere with this view of the matter.

It has, however, been contended that there is something in the practice of Courts of Prize in this country with regard to requisitioning for the use of His Majesty of ships that are in the custody of the Court pending their adjudication in prize, which is at variance with the principles above stated. Their Lordships think that the contention is fallacious. When a ship is placed in the custody of the Prize Court with a view to adjudication in prize, then and there it is either liable to condemnation or is not. Time is necessary in order that the evidence may be got together on both sides and may be considered in due course by the Court; but if all the evidence were immediately forthcoming and the claimant had a proper opportunity of being fully heard, he would have no grievance if the adjudication were to take place forthwith. Furthermore, pending adjudication he has no benefit from the use of the ship, and she remains at his risk in the Marshal's custody. Accordingly, under Orders and Rules validly made, a practice has been established, which is beneficial alike to the captors, to the Court, and to the claimant. This is no mere matter of municipal law, which does not bind a foreign Government except in virtue of some submission to the jurisdiction; it is part of the practice of a Court which administers the law of nations, none the less so that it is regulated by Orders which are made in virtue of statutory authority. The ship, if requisitioned for the use of His Majesty, may be released to the Admiralty for an indefinite period, on the terms of substituting for the ship in the Marshal's custody her appraised value, paid or payable into Court, or for a short and definite period without any terms requiring appraisement. In the former case, at any rate, which is the case in question, the claimant is thus protected from depreciation and marine risks, and the Court is relieved from the responsibility of her custody. If ultimately a decree is made in his favour, the claimant could desire nothing better than payment of the appraised value; if a decree for condemnation is made, all necessary effects are secured by the release of the Admiralty from the obligation to pay the value into Court, and by the change of property as against all the world by a judgment in rem. An order for requisition in itself, however, is not a judgment in rem; it does not purport to change property; it authorizes use and using up—that is, consumption—but it

J. C.
1922
THE PELLWORM.

does not make the thing requisitioned a subject of sale. The Orders and Rules make separate provision for orders for sale, and their Lordships must not be taken to agree with the statement of Sir H. Duke P. in the Court below that an order for leave to requisition, though followed by delivery, in itself changes the property. In cases where the law of nations requires the return of a ship in specie, the Court has no authority to defeat its duty in advance, and an order merely as to the use of the ship does not purport to do so; as Sir William Scott says in *The Vrow Anna Catharina* (1), " the Court is at all times very much disposed to pay attention to claims of this species, ... When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy." In fact the order made provides only for release and delivery to the Crown or for temporary delivery, as the case may be. Furthermore, the Court's own rules condition the requisitioning of ships liable to condemnation quite differently from art. 2 of the Sixth Hague Convention of 1907, which gives a contractual right to requisition detained ships subject to an express condition of paying compensation. They impose no liability to answer for accidental loss, but are fully satisfied by the deposit of the appraised values. Their Lordships can find nothing, either in the decisions or in the words of the Orders and Rules, to warrant the contention that for the purposes of a claim of territory the appraised value of a ship, when once it has been requisitioned, must be treated in all circumstances as if it were the ship herself, lost or not lost; nor can they find anything to restrict the right of the Prize Court to require the return to its Marshal of a requisitioned ship which is still in specie, in order that it may decree its release to the claimant Government. The order, giving leave to requisition, which the Court itself made, it is also competent in such a case to revoke. *The Düsseldorf* (2), for which an order of release was made, had herself been requisitioned, and this was not raised as an objection to her release. In the

---

(1) 5 C. Rob. 15, 16.

(2) [1920] A. C. 1034.

J. C.
1922
THE PELLWORM.

present case the importance of this point has been somewhat removed by the undertaking, given by the Solicitor-General, that, if their Lordships should be of opinion that the ships should be restored, the Admiralty would give them up accordingly.

It may be that if, by arrangement or otherwise, the two ships are returned to Dutch waters by the British Government, no expenditure in the matter will fall on the Government of the Queen of the Netherlands. If so, part of the order which their Lordships think is the right one will become inoperative. The case of such expenditure being incurred ought, however, to be provided for.

Their Lordships will humbly advise His Majesty that, subject to the above-mentioned addition to the decree of Lord Sterndale, the appeal of the Procurator-General should be dismissed with costs; and that the cross-appeal, so far as concerns damages, should also be dismissed with costs; but that it should be allowed with costs and the order of Sir H. Duke, which is appealed against, should be set aside, so far as concerns the restoration of the *Breitzig* and *Heinz Blumberg* and the payment over by way of restoration of the appraised values of the *Pellworm* and the *Marie Horn*; that a decree should be entered for the claimants accordingly, and for payment of the expenses, if any, falling upon the claimants in connection with the return to Dutch territorial waters of the *Breitzig* and the *Heinz Blumberg*, and that the cause should be remitted to the Prize Court to make any order required for an inquiry into the fact and the amount of such expenses and for payment of them to the Dutch Government and also for the discharge of any undertaking given by the Admiralty in respect of the appraised value of the ships restored in specie.

Solicitor for Procurator-General: *Treasury Solicitor.*

Solicitors for State of Netherlands: *Ince, Colt, Ince & Roscoe.*

[PRIVY COUNCIL.]

THE BLONDE AND OTHER SHIPS.

J. C.*
1922
Feb. 10.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Outbreak of War—German Ships detained in British Ports—Requisition—Owners' Rights to release—Applicability of Hague Convention—German Misconduct of War—Effect of Peace Treaty—Treaty of Versailles, Part VIII., annex 3, *art.* 1; *Part X., art.* 297*—Hague Convention No. VI., arts.* 1, 2, 6.

Art. 2 of Hague Convention No. VI. provides that a belligerent may not confiscate an enemy merchant ship detained in the belligerent's port at the commencement of hostilities, but may "merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of payment of compensation."

The applicability of the above article between two belligerents does not depend upon whether they have mutually agreed to allow days of grace as contemplated in art. 1; art. 2 is obligatory, while art. 1 is optional. Whatever may be the true meaning of the condition in art. 6 that the Convention is to apply only "if all the belligerents are parties," Great Britain during the recent war frequently recognized that the Convention was binding, and thereby waived the right to rely upon non-fulfilment of the condition.

The conduct of Germany during the war in committing many acts in flagrant defiance of the Hague Conventions does not prevent art. 2 of the sixth Convention from being binding upon Great Britain. Apart from considerations of municipal law, it is not the function of a Prize Court, as such, to be a censor of the general conduct of a belligerent, as distinct from his dealings in the particular matters before the Court, or to sanction disregard of solemn obligations by one belligerent because it reprehends the whole behaviour of the other.

Where a detained ship has been requisitioned under Order XXIX. of the Prize Court Rules, 1914, and sunk, the German owner, if entitled to restoration under art. 2, is entitled to the appraised value as the compensation provided for by art. 2, and that right exists although the ship was sunk by German hostile action.

Part VIII., annex 3, art. 1, of the Treaty of Versailles operates to transfer to the Allied and Associated Powers the property in all German ships of 1600 tons and upwards. The former owners of ships of that tonnage therefore have no locus standi before the Prize Court under art. 2 of the sixth Convention, nor right to discuss how those Powers may deal inter se with the ships. But annex 3 effects no transfer of ships of lesser tonnage, at least until selected for surrender.

Art. 297 of the Treaty does not annul or modify the obligations under the Convention. The claim of Great Britain thereunder to retain ships to the release of which the German owners are entitled under art. 2 of the Convention is not one for determination by the Prize Court, but orders of the Prize Court for release should contain a provision to prevent rights under the Treaty from being defeated.

---

* *Present:* Lord Sumner, Lord Parmoor, and Sir Arthur Channell.

Three ships, each of under 1600 tons gross, owned by a Danzig corporation and detained in a British port at the commencement of hostilities, were requisitioned under Order XXIX. for the service of the Crown; while so requisitioned one of the ships was lost by grounding, and one by German hostile action. Applying the various considerations above stated, an Order was advised that the appraised value of the two lost ships, and the ship remaining in specie, be released to the Custodian of Enemy Property to be delivered to the Danzig corporation, if after six months no proceedings had been begun for delivery to the Crown, otherwise to abide the final determinations of those proceedings.

Judgment of the Prize Court [1921] P. 155 reversed.

Further advised, on petitions, that certain German ships of 1600 tons gross and upwards detained as above should be released to the Crown, the orders for detention being discharged.

APPEAL from a judgment of the Admiralty Division (in Prize) delivered on January 23, 1921 (1); also, petitions and cross-petitions for the release or condemnation of enemy ships.

The appellants, a corporation registered at Danzig, appealed from a decree of the President (Sir Henry Duke) condemning the steamships *Blonde*, *Hercules* and *Prosper*. The ships were registered at Danzig, and were respectively of 613, 1095 and 759 tons gross. They were seized in British ports in August, 1914, upon the commencement of hostilities with Germany. In January, 1915, the Prize Court made orders in the form in *The Chile* (2) for the detention of the ships until further orders. They were requisitioned for the service of His Majesty by orders made by the Prize Court under Order XXIX. of the Prize Court Rules, 1914. While under requisition the *Blonde* had been lost by grounding and the *Hercules* was sunk by an enemy torpedo.

Upon application by the Procurator-General in 1920 for condemnation of the ships, the President (Sir Henry Duke) held that the special provisions in the Treaty of Versailles as to Danzig left the appellants, for the purpose under consideration, in the same position as if they had remained

(1) [1921] P. 155.

(2) [1914] P. 212.

German subjects; and, following his decision in *The Marie Leonhardt* (1), he held that in the absence of agreement between Great Britain and Germany to the contrary, German merchant ships found in British ports at the commencement of hostilities were subject to condemnation. The learned President accordingly condemned the ships; the present appeal was from that decree.

There were also before the Privy Council petitions and cross-petitions relating to the *Gutenfels* and certain other German steamships. In the case of each of these ships the Privy Council upon appeal (2) had made orders, similar to the order in *The Chile* (3), for detention until further orders. The present petitions and cross-petitions were on the part of the respective owners for the release of the ships, and on the part of the Crown for their condemnation. Each of these ships was of over 1600 tons gross. The arguments were heard together with those in the appeal, and the present judgment of the Judicial Committee in the appeal deals also with the petitions and cross-petitions.

The Hague Convention, 1907, No. VI., provided (inter alia) as follows (4): Art. 1: "When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace . . . ." Art. 2: "A merchant ship, which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation." Art. 6: "The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the convention."

---

(1) [1921] P. 1.

(2) E.g. [1916] 2 A. C. 112; [1918] A. C. 500 and 501*n*.

(3) [1914] P. 212.

(4) The official English translation appears in the Blue Book, Miscellaneous, No. 6 (1908) [Cd. 4175].

By the Treaty of Versailles, 1920, Part VIII., annex 3, art. 1, Germany ceded to the Allied and Associated Power all German merchant ships of 1600 gross tons and upwards, and an unascertained moiety of certain smaller ships. By Part X., art. 297, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests within their territories belonging to German nationals. By Part III., arts. 100–109, Danzig was constituted a Free State, and special provisions were made as to property within its territory. By art. 105 the ordinary residents of Danzig were to lose their German nationality, in order to become nationals of Danzig.

1921. Oct. 28, 31; Nov. 1. *Sir John Simon K.C.* and *Inskip K.C.* (*Balloch* with them) for the appellants. The appellants are entitled to the release of the *Blonde*, and to the appraised value of the *Prosper* and *Hercules* under art. 2 of Hague Convention No. VI. That article applies whether or not there was an agreement between Great Britain and Germany to allow days of grace as contemplated by art. 1. That point was raised in argument in *The Gutenfels* (1); it was alluded to in the judgment but not decided. In *The Turul* (2) the Judicial Committee regarded art. 2 as not being dependent upon art. 1. The appellants' contention on this point was not urged before the President, because in *The Marie Leonhardt* (3), and other cases the President had given effect to a different view. Apart from the Convention the diplomatic correspondence between Great Britain and Germany during the early months of the war amounted to a mutual agreement to restore ships detained in port at the outbreak of war. Art. 6 does not prevent the Convention from applying. Both Great Britain and Germany were parties to it when the ships were detained; it is not material that certain countries which became belligerents during its progress were not parties. A contrary view would lead to curious results as was pointed out in *The Möwe.* (4) The Convention

(1) [1916] 2 A. C. 112, 116, 119.
(2) [1919] A. C. 515, 518.
(3) [1919] P. 1.
(4) [1915] P. 1, 12.

rested principally upon compromise, and could not be expected to exhibit the comprehensiveness of a code: *Procurator in Egypt* v. *Deutsches Kohlen Depot.* (1) The right to restoration under the Convention or agreement is not affected by the provisions for the cession of ships and property contained in the Treaty of Versailles. By the Treaty the ships became vested in nationals of the Free State of Danzig created by it, and no right to condemn arose till a later date. The effect of the Treaty was to recognize that the property of the appellants as a Danzig corporation was free from the incubus of German ownership. In any case the provision as to the cession of ships does not apply, since all these ships are under 1600 tons gross. Having regard to Order XXIX, r. 4, of the Prize Court Rules, 1914, the appellants are entitled to the appraised value of the ships sunk while requisitioned.

Sir Ernest Pollock S.-G. (*Sir Gordon Hewart A.-G.* and *Wylie* with him) for Procurator-General, respondent to the cross-appeals. The three ships, as enemy ships seized in port at the outbreak of war, are subject to condemnation in the absence of any agreement to the contrary: *Lindo* v. *Rodney.* (2) There was no agreement to the contrary by virtue of either the Convention, or the correspondence relied on. Arts. 1 and 2 of the Convention must be read together; art. 2 does not apply unless an agreement has been made as to days of grace. That view was conceded in *The Marie Leonhardt* (3); there is no decision of the Judicial Committee to the contrary. Further, the Convention did not apply because the condition in art. 6, namely, that all the belligerents should be parties, was not fulfilled. The United States were not parties; nor were Serbia, or Montenegro, all of which countries were belligerents. The words "all the belligerents" in art. 6 cannot be limited to those who were belligerents at the time of the seizure. That view was indicated in *The Möwe.* (4) The correspondence relied on did not amount to the agreement

---

(1) [1919] A. C. 291, 301.
(2) (1782) 2 Doug. 212*n.*
(3) [1921] P. 1.
(4) [1915] P. 1.

J. C.
1922
THE BLONDE.

alleged. The essential character of agreements of this kind is reciprocity: *The Santa Cruz.* (1) In *The Gutenfels* (2) it was said that the Convention involved a "reciprocal obligation," and the question whether art. 2 applied was left open to see whether Germany observed her position of reciprocity. Germany did not do so. As appears from a communication to Madrid in October, 1915, Germany planned to recover retained ships visiting neutral ports while requisitioned. That was a repudiation of art. 2, which recognized the right to requisition retained ships. By a note addressed to Siam on March 30, 1917, Germany maintained, in answer to neutral protests, that the Convention was not binding upon any of the belligerents. These repudiations put an end to any obligations on the part of Great Britain to Germany under the Convention, or under the agreement, if there was one. Further, in the course of the war Germany by her conduct showed an intention not to be bound by any Convention or agreement. (3) That released the obligation of this country. It is not contended that there arose a right to retaliate, but that there ceased to be that continued reciprocity by Germany which was a condition to the Convention being binding. The observations in *The Nereide* (4) are therefore not applicable. The appellants were German nationals until the Treaty made them nationals of Danzig;

---

(1) (1798) 1 C. Rob. 49, 62.

(2) [1916] 2 A. C. 112, 119.

(3) The record (pp. 34 to 65) contained an affidavit by the Procurator-General which is of historical value. It set out, with particulars as to dates and statistics, misconduct by Germany under the following heads: (*a*) sinking by submarines of merchant ships (including passenger ships) and fishing vessels, without warning and with consequent loss of civilian lives, including women and children; (*b*) sinking by submarines of hospital ships with loss of life; (*c*) bombardment of undefended coastal towns by naval forces; (*d*) air raids on undefended towns and cities with loss of civilian inhabitants; (*e*) promiscuous laying of mines and consequent sinking of neutral and other ships; (*f*) compulsion of population of occupied territories to take part in military operations against their country; (*g*) deportation, enforced labour, and unjustifiable penalties inflicted on those populations; (*h*) use of poison gas and liquid fire. Provisions of the Hague Conventions, 1899 and 1907, which were infringed by the above acts were set out in the affidavit.

(4) (1815) 9 Cranch, 388, 422.

J. C.
1922
THE BLONDE.

for the purpose now considered they are in the same position as if they were still Germans.

Sir John Simon K.C. in reply. The Prize Court is not entitled to survey the conduct of Germany to see if the sixth Convention should be applied. There is no evidence that Germany refused to be bound by art. 2. The claim to retain the ships under the Treaty is not one for the Prize Court to determine.

Upon the petitions and cross-petitions there appeared

Sir Gordon Hewart A.-G., *Sir Ernest Pollock S.-G.* with *Darby*, *Wylie*, *Trehern*, *Pearce Higgins*, and *H. L. Murphy* in the several cases.

Sir John Simon K.C., *Inskip K.C.* and *Balloch* for the shipowners.

1922. Feb. 10. The judgment of their Lordships was delivered by

LORD SUMNER. These are consolidated appeals from the President's judgment rejecting the claims of the appellant company for release with compensation and condemning the vessels in question, the *Blonde*, the *Prosper* and the *Hercules*. They were small German steamers, two under 800 and one under 1100 tons gross, which at the outbreak of the war happened to be in London and Liverpool, and were seized and proceeded against in Prize. Orders were in due course made for their detention in the form which was settled in *The Chile* (1), and followed in many cases during the war. Shortly afterwards they were requisitioned by order of the Court for the use of His Majesty, and passed into the service of the Admiralty. Two have since been lost while under requisition—the *Blonde* by grounding off Flamborough Head, and the *Hercules* through being struck by an enemy torpedo. The *Prosper* still remained in the hands of the Crown under the requisition order at the time when the case was heard.

The appellants are a shipping company registered and carrying on business at Danzig, where the ships also were registered, and at the outbreak of war they owned a number of the shares in each vessel, though not all; but they have been throughout treated as the full owners for all present purposes. Danzig having become a Free City under the Treaty of Versailles, the appellants, as citizens of Danzig, claim to be in a better position in these proceedings than if they had still been subjects of the German Empire, and no point has been taken on behalf of His Majesty's Procurator-General that, as Danzig was not a party to the Hague Conventions, citizens of Danzig should not be allowed to claim the benefit of them. All that is said is that, in respect of Germany's actions during the war, the appellants, as they enjoyed the benefit, must also take the burden, although, as regards disabilities and liabilities imposed on Germany by the terms of the Treaty of Versailles, they may escape, having ceased to be Germans at the moment when the treaty first became operative. The principal point is one turning on the Hague Conventions of 1907, which, though not argued below owing to some misunderstanding as to the state of the authorities, must be dealt with on one or other of the present groups of appeals. The appellants claim the benefit of the sixth Convention, or in the alternative of a supposed agreement to the like effect, arrived at ad hoc by Great Britain and Germany in the early months of the war. The Procurator-General denies that the sixth Hague Convention ever became applicable, first, for want of ratification by all the belligerents, and secondly, because art. 1, on which the appellants rest their claim, would only apply if Great Britain had put art. 2 in force, which never was done. As to the supposed agreement ad hoc, he says that the negotiations were entered into for other purposes and, further, broke down without conclusion.

---

(1) [1914] P. 212.

The history of the matter is this. Early in August, 1914, pursuant to an Order in Council of August 4, a proclamation was issued, which declared that German ships in British ports would be detained, but that His Majesty proposed ultimately to apply the sixth Hague Convention, provided that a Secretary of State certified, before midnight of August 7, that he was satisfied, from communications received, that Germany had expressed a similar intention. This period expired without the receipt of any sufficient communication, and the fact was duly intimated to the Admiralty. Thereupon, it is said, the sixth Hague Convention, so far as Great Britain and Germany were concerned, failed to come into operation, and accordingly the provisions of art. 2 had no effect in the late war.

In spite of this notice to the Admiralty, communications passed between the two Powers through the good offices of the diplomatic service of the United States. Letters and telegrams were exchanged, and sometimes they crossed one another. The German Government were concerned not merely as to the treatment of detained ships under the sixth Convention, but also as to that of the crews under the eleventh. They asked whether His Majesty's Government intended to observe the provisions of these Conventions, and in what sense they understood some of their obscurer terms. By the end of September or the beginning of October both parties had stated distinctly that the sixth Convention would be observed, and had expressed their construction of it, in senses which were substantially identical. As to the eleventh, though not far apart, it does not appear, on the documents which are forthcoming, that they were ever in absolute accord. Their Lordships were not informed that His Majesty's Government ever published this correspondence at the time as the formal record of a new agreement therein arrived at.

The learned President came to the conclusion that this correspondence, viewed as a negotiation for a final agreement, never passed beyond the stage of mere negotiation, the discussions as to the two Conventions not being severable and no agreement having been arrived at as to the eleventh Convention. The contrary was strenuously urged before their Lordships. Logically, however, there is a prior issue—namely, whether this correspondence was entered upon or was pursued as a negotiation intended to lead to a new international agreement at all. The treaties and conventions which Courts of Prize are accustomed to construe and give effect to are written instruments duly executed and ratified. It is a novelty to call on them to spell out such an agreement from a series of messages passing to and fro. Here there is not so much as a protocol, and although no doubt consensus ad idem is fundamentally necessary to an international agreement, as it would be to a private offer and acceptance under municipal law, it does not follow that in the intercourse of sovereign States every interchange of messages, some formal and some informal, should be deemed to result in a new and binding agreement as soon as the parties have reached the stage of affirming identical propositions. Each Power was anxious to know the intentions of the other, and in their Lordships' opinion their object, and their sole object, was to ascertain whether and in what way effect would be given to the old agreement—namely, the sixth Hague Convention, and was not to enter into a new agreement dealing with the same subject and tending to the same effect, but concluded under conditions as embarrassing and with a result as superfluous as could be imagined.

It is true that expressions are to be found on the German side, in the latter part of these communications as well as at the outset, which are not inappropriate to a negotiation for, and to the conclusion of, a new agreement. The German Government in August states its acceptance of a British proposition to release merchant ships, made in the Order in Council of August 4, and in October declares that "there now exists between the German Government and Great Britain an agreement as to the treatment of merchant ships." These expressions were not, however, adopted by His Majesty's Government. They throughout stated their intention to abide by the sixth Hague Convention, provided Germany would do the same, and there are despatches from Germany at the end of August and in September which show that this, which was the real aspect of the matter, was fully recognized by the German Government. The language of the communications, when carefully examined, does not support but displaces the theory that a new agreement was in negotiation between belligerents to effect what could have been better secured by reciprocal recognition of a Convention, to which both parties had adhered while they were still at peace.

In the result His Majesty's Government became satisfied that there existed on the German Government's part such an intention to observe the Convention reciprocally as justified them in proceeding publicly to observe the Convention for their own part, and thenceforward orders were made in the Prize Court, at the instance of the Crown, which were always regarded as being framed to carry out the obligations of the sixth Hague Convention, while securing the interests of this country in the possible event of Germany's failing at the conclusion of the war to be of the same mind as to her obligations as that which had been manifested at the beginning. Their Lordships may further observe that, on balance of the importance of the German merchant ships detained by Great Britain against that of British merchant ships detained by Germany, the latter Power had a strong material interest in continuing to execute the Convention to the end, and was little likely to intend to abandon or to desire to forfeit the ultimate advantages, which observance of the Convention would assure. It therefore becomes necessary to consider in what the obligations of that Convention consist according to its terms.

Article 6 of the sixth Convention of 1907 declares that "the provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention." The French text for the last part of this sentence reads: "et seulement si les belligérants sont tous parties à la Convention," and there may be significance in the different positions in the sentence occupied by the respective words "all" and "tous." Of the Powers belligerent in some theatre or other and against one combination of opponents or another during the late war, Serbia and Montenegro never ratified the Convention in question. The United States were not parties to it at all. At the time when the ships now under discussion were first detained, Germany had not declared war on Serbia, nor had Serbia become formally the ally of Great Britain, and, so far as their Lordships are aware, actual hostile action by Germany against Serbia and actual military support to Serbia by Great

Britain both belong to later stages in the war. A nice question arises, therefore, whether Serbia was a belligerent in such a sense that her failure to ratify the Convention prevents its being applicable as between Germany and Great Britain in the matter of these ships? If the position of Serbia does not prevent the obligations of the Convention from attaching, still less can this result from that of the United States, who were not one of the "contracting Powers." To put the point otherwise, are the "belligerents," who are to be taken account of for the purposes of this article, the belligerents merely who detain or suffer detention, or are they all the Powers who are simultaneously engaged in war, whether acting in alliance or in direct conflict with one another or not? Is the adherence of all the belligerents, however remote from each other or unconnected with the ships and their detention, the consideration for the attaching of the obligation of any one of them, or are the mutual promises of the Powers concerned—that is, of the detainer and the detained—a sufficient consideration to bind them both together? Mutuality is of the essence of the Convention. Is that mutuality complete if the detaining sovereign and the sovereign of the ships detained ratify and abide by the Convention, or is it imperfect, so as to prevent the application of the Convention, unless and until other Powers, in no way concerned in the ships or their fortunes, but merely connected with one or both of those sovereigns in the general war, have likewise ratified and likewise abided by the Convention, whether or no they have ships or harbours, and whether or no they make or suffer captures or are ever directly affected by maritime war at all?

It is very hard to credit that the operation of an agreement, so earnestly directed to the attainment of the highest practical ends in war, should have been deliberately made to depend on the accidents or the procrastinations of diplomatic procedure in time of peace, even when no real relation existed between the condition and the consequence, between the ratification of all the parties and the detention of the ships of one of them. Their Lordships, however, have not found it necessary to give a final answer to these questions. Whether in the circumstances of these cases the Convention was applicable or whether it might be successfully objected that it had never become applicable, the result is the same, for the objection is clearly one that can be waived, and in their Lordships' opinion it was waived by His Majesty's Government, alike by the whole tenor of the above-mentioned correspondence and by the whole attitude of the Crown in matters of prize affecting such cases as these throughout the war. De facto as well as de jure the position of Serbia and the other Powers, as regards both the Convention and the conduct of the war, was well known to His Majesty's Government at all material times. Yet days of grace were in fact allowed to Austrian ships by proclamation dated August 15, 1914, as to which see *The Turul.* (1) *The Chile* (2) order was wholly inept if the Convention had and could have no application, and the Crown should have applied to the Court not for leave to requisition, but for decrees of condemnation. The fact that, in spite of the doubt expressed by Sir Samuel Evans P. in *The Möwe* (3), the Crown acquiesced in numerous orders in that form and never asked for condemnation of these detained ships so long as hostilities lasted, is conclusive to show that any right to rely on the non-fulfilment of art. 6 was waived. The arguments of the Attorney-General on behalf of the Crown in the case of *The Gutenfels* (4) and *Procurator in Egypt* v. *Deutsches Kohlen Depot* (5) are of especial importance in this connection.

In construing such an international instrument as that now in question, it is profitable to bear in mind from the outset sundry considerations, which are not the less important for being doubtless somewhat obvious. It results from deliberations among the representatives of many Powers, in which none can expect without some concession to insist upon his country's interests, its language or its law. It is expressed in what is by tradition the common language of international intercourse, but it would be unreasonable in

---

(1) [1919] A. C. 515.
(2) [1914] P. 212.
(3) [1915] P. 1, 12.
(4) [1916] 2 A. C. 112, 115.
(5) [1919] A. C. 291, 292.

J. C.
1922
THE BLONDE.

the circumstances to expect of it either nicety of scholarship or exactitude of literary idiom. Neither the municipal law nor the technical terms of the negotiating countries can be expected to find a place in its provisions. Where interests conflict, much must be allowed to the effects of compromise; where the principles, by which future action is to be guided, are laid down broadly, leaving to the Powers concerned the actual measures to be taken in execution of those principles, it is unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline.

On the other hand, it is specially necessary to discover and to give effect to all the beneficent intentions which such instruments embody and which their general tenor indicates. It is impossible to suppose, whatever the imperfections of their phrasing, that the framers of such instruments should have intended any Power to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasizing the absence of express words, where the sense to be implied from the purport of the Convention is reasonably plain. Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument in any narrow sense, such as would reserve for them future loopholes of escape from its general scope.

Turning to arts. 1 and 2 of the sixth Hague Convention, it is important to remember that, before its date, and since its date whenever it is not in force, the law of nations permitted and entitled a belligerent to make prize of an enemy merchantman found within his ports at the outbreak of war (*Lindo* v. *Rodney* (1)). It is true that in several instances during the nineteenth century belligerents mitigated the rigour of the rule and granted days of grace for the free departure of such vessels. The practice was certainly modern, but it was neither uniform nor universal, and on each occasion it rested with the belligerent to elect whether the rule recognized by the law of nations should be mitigated or not. It is not surprising that the negotiators of 1907 got no further than agreeing that permission to depart freely, within a time to be fixed by the Power entitled to capture, was a thing desirable indeed, but not obligatory.

---

(1) 2 Doug. 612*n*.

Under these circumstances it is asked with much force: Why should Powers, who could not agree that days of grace should be given at all, find themselves able to concur in a more extensive modification of the law then existing and to agree that ships, unable to avail themselves of permission to depart, should not be made prize but should only be detained? The argument finds some support in the fact that the article dealing with days of grace precedes that limiting the right to such condemnation, and in the further fact that art. 2 certainly is closely allied with art. 1 and is so far dependent on it that instead of stating the circumstances in which it applies, as a self-contained article might be expected to do, it finds their definition only in a reference to the first article and to those circumstances mentioned in it, which depend on the choice and the clemency of the capturing Power. Why, then, should Powers, which fail to agree to such a modification of belligerent right as is involved in the grant of days of grace, be deemed capable of the graver modification which is involved in abandoning the right to capture and being content with a right to detain?

The true question, however, is not why they should have but whether they have done so, and it may be usefully met, if not completely answered, by asking another. The Powers, great and small assembled at The Hague in 1907 in what was undoubtedly a great effort, involving mutual concessions and separate sacrifices, to regulate and to humanise the practices of maritime war. Is it consistent with their dignity or with the seriousness of the negotiations to read a part of their handiwork as meaning that a belligerent need not spare an enemy ship in his own port at all unless he chooses, but that if, from good nature or improvidence, he waives his right to bar her exit absolutely, he is to be bound by convention to do more than he chooses to do by express grace, and may then only detain, when otherwise he could seize ? To say that the compact expressed in art. 2 has been providently entered into in case two belligerents should reciprocally grant days of grace under art. 1, but that until that event happens it is a mere foretaste of things to come, is to attenuate this Convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the article, because the length and character of the opportunity for departing in peace rests entirely with the grantor of it. In itself a concession requiring immediate departure differs only notionally from a belligerent act inhibiting departure altogether. Is the modification of belligerent right to take place only in the one case and not in the other ? and, if so, on what show of reason can it be founded or to what inveterate prejudice or ingrained self-interest has so illogical an arrangement been conceded ?

Arts. 3 and 4, however, which are strictly in pari materia, seem to place the matter beyond doubt. Art. 3 contains no reference to arts. 1 and 2. It deals with a case to which days of grace and opportunities of departure have no application—that is, to ships that are found by their enemy at sea on the outbreak of war. The argument is unaffected by the fact, that as to this article Germany made reservations at the time when the Convention was ratified, for the effect of the reservation is limited to the article with which it deals. A reservation as to a part of the Convention is quite consistent with adoption of the rest of it. The article, clearly and independently of the others, requires that such ships, though by the law of nations good prize, may not be confiscated—that is, seized and brought before a Court of Prize for condemnation. They may only be detained—of course, under the order of such a Court and upon conditions imposed by it. Further, when art. 4 comes to deal with cargo on board "vessels referred to in arts. 1 and 2," it prescribes the same measure of liability as that laid down in art. 3, and describes that prescription as being an identical principle. Their Lordships, therefore, think it clear that in effect this Convention says: "Ships which find themselves at the outbreak of war in an enemy port shall in no case be condemned, if they are not allowed to leave, or if they unavoidably overstay their days of grace, but it would be better that they should always be allowed to leave, with or without days of grace." In effect, while art. 1 is only optional, art. 2 is obligatory. They reject the construction which makes the prohibition upon confiscation depend on a prior election to do what art. 1 desiderates but does not require.

Assuming that the sixth Convention was binding on this country in the early stages of the war in such a sense as would prevent the condemnation of these vessels at the end of it, the Procurator-General further contends that during its progress Germany has by her conduct given this country the right to refuse to be bound any further by its terms so far as German ships are concerned. It appears that in 1915, though the fact did not become known to His Majesty's Government till afterwards, the German Foreign Office instructed the German diplomatic officials in Spain to inform the owners of these detained ships of the arrival of any of them in Spanish ports when navigating under requisition. The object of this instruction seems to have been to give the owners the opportunity of taking proceedings in Spanish Courts, if so advised, for recovering possession of them in Spanish waters under judgments pronounced for the purpose. It does not appear whether any such proceedings were ever taken, or, if so, with what result. Furthermore, in correspondence with the Government of the King of Siam the German Foreign Office had advanced, as a ground for refusing to be bound by the eleventh Hague Convention, that it had never been ratified by all the then belligerent Powers. Finally, it was contended that the many outrageous and indefensible measures adopted by Germany during the war, and especially her defiance of the Hague Conventions applicable, notably by the use of poisonous gas and of contact mines, by the destruction of hospital ships, the deportation and forced employment of civilians and the bombardment of open towns, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional obligations, as to the conduct of war, and thus gave to Great Britain the right to treat herself as released from her correlative obligation under the sixth Hague Convention of 1907. There are two obvious flaws in this argument. First, so far as concerns the intentions of Germany she may have flagrantly disregarded obligations which fettered her freedom of action to her disadvantage. It does not necessarily follow that she intended to repudiate a convention under which she stood to gain largely in the long run. There is, in fact, no evidence of any conduct on Germany's part down to the conclusion of the armistice which put it out of her power to return detained ships in pursuance of art 2. Secondly, so far as concerns the consequent rights of this country, even if the rules of English municipal law as to the discharge or dissolution of contracts be applicable to a case arising between sovereign Powers, repudiation by Germany could do no more than give to this country the right to accept that repudiation and to treat the Convention as no longer binding. There is no evidence whatever that this was ever done; indeed it is plain that His Majesty's Government continued, down to the conclusion of hostilities and even to the conclusion of peace, to treat this Convention as binding. Most, if not all, of the *Chile* orders had been made by the end of 1916, since which date, as well as before it, most of the facts now relied upon were notorious, yet no step was taken to obtain a "further order" in any case, and it is to be observed that the reason for making provision for a "further order" was not doubt as to the declared intentions of Germany with regard to recognition of the Convention, but uncertainty as to the continuance of that intention on her part. If so, in the language of the English cases, the contract was kept alive for the benefit of both parties, since one party cannot of his own choice put an end to it by disregarding its obligations, and so long as the contract subsists, each party can claim the fulfilment of the provisions which are in his favour, just as he remains bound to answer for his disregard of obligations which he ought to satisfy. Their Lordships, however, do not rest their conclusions on rules applicable to private contracts in English

Courts. The principle of ascertaining the intention of the parties to an agreement by giving due consideration to what they have said is no doubt valid in international matters, but there are many rules both as to the formation, the interpretation and the discharge of contracts, which cannot be transferred indiscriminately from municipal law to the law of nations. They prefer to rely on a wider ground. It is not the function of a Court of Prize, as such, to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters which come before the Court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behaviour of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which, when confined within recognized limits and embodied in due form, a Court of Prize is bound to give effect. In a matter, however, which turns on the obligation of a single and severable compact, the Court must inquire whether that very compact has been discharged, and ought not to be guided by considerations arising only out of the general conduct of war. Their Lordships are clearly of opinion that neither in regard to the instructions given to the German Embassy in Madrid, which were after all a domestic matter and were at most a threat never communicated by Germany to His Majesty's Government; nor to the answer given to the Government of the King of Siam, which not only was res inter alios acta but related to a separate Convention and proved nothing as to the German Government's intention to observe Convention VI.; nor in regard to the general delinquencies of the German forces during the war, is it possible to find juridical grounds for releasing His Majesty's Government from their obligations under the sixth Hague Convention, when once they had attached. It has not even been shown that on the termination of the war Germany was not willing to return such British ships as she had detained, in so far as they had not been previously released under the armistice or otherwise.

It would follow from the foregoing considerations that the owners of the vessels in question would be entitled to orders of release, but now arise the difficulties, that of these vessels only one survives, and that all matters occurring during the war are, as between German claimants and the Procurator-General, now to be considered in the light of the Treaty of Versailles.

Art. 2 of the sixth Convention, after prescribing that the belligerent's right is limited to detention of the ship "under an obligation of restoring it after the war without compensation," proceeds: "or he may requisition it on condition of paying compensation." What is this compensation, and when and in what events is it to be paid? The question is material, because during the period of requisitioning the *Blonde* was lost by perils of the sea, without fault on the part of any one responsible, and the *Hercules* cannot now be restored, because the German combatant forces themselves destroyed her, purporting to do so as a legitimate act of war. The provision is that a detained vessel is simply to be restored without compensation. Nothing is said to impose on the belligerent any duty to provide for her safety or to effect repairs. If he restores her, he does so without compensation, and meantime she has been detained at her owners' risk. Next, the belligerent is given an express right to requisition, but on condition of paying compensation. Whether requisition has the same meaning in the Convention that it has in Order XXIX., or whether, in addition to the right to use, it includes a right to appropriate, are questions not now material; for present purposes it is sufficient to assume that the meaning of the word in both instruments is the same. While on the one hand nothing is stipulated as to payment of freight or of compensation for the use of the ship while under requisition and nothing is expressed as to repairs, on the other hand, apart from circumstances which discharge the requisitioning Government from all the obligations of the Convention, the exercise of the right to requisition during detention involves that, if she is not restored at all, compensation takes her place, and for this purpose her money value, when requisitioned, is the obvious substitute for the ship herself in specie.

J. C.
1922
THE BLONDE.

It is no doubt paradoxical that, the ship having been lawfully requisitioned by the Admiralty without any obligation to pay for using her or for the consequences of mere use, His Majesty's Government should be called on to compensate her German owners, because the German forces have sunk her by an illegitimate act of war. The question, however, is one of construction of the article. It begins by substituting detention for confiscation, thus ensuring to the owner the right to get his ship back, so far as the detaining belligerent is concerned. On this is engrafted a proviso for the benefit of the belligerent, of which he may avail himself or not as he pleases, and this proviso imposes on him an unqualified condition—that of compensation. This must be read literally, and as nothing further is prescribed in favour of the detaining belligerent, he cannot have the benefit of exceptions by implication. The Convention says that requisitioning is to be on condition of paying a compensation: the condition would be frustrated if, though the obligations of the Convention had not been terminated, neither ship nor compensation were forthcoming.

The Convention furthermore does not define the compensation, or the mode of calculating it, or the time of payment. These are matters which it leaves for subsequent determination, and it is reasonable to infer that at any rate the determination of the Court of Prize, before which the vessel in question has been duly brought, is within the purview of the Convention. Accordingly, if the recognized procedure as to requisitioning has been followed, as was done in the present case, and if that procedure provides for the substitution of money for the ship, that money cannot be regarded as being other than the compensation to which the article applies. Under the Prize Rules and Orders the Court can allow the ship, which is in the custody of its Marshal, to be requisitioned by the Crown, and in the course of such requisitioning to be necessarily exposed to maritime and belligerent hazards. This involves the Court's parting with the custody and with the immediate control. For the security of the owner the Court may require the deposit or a binding undertaking for the deposit in Court of the ship's appraised value, and although the Court by no means parts with its control over the ship for all purposes, or precludes itself altogether from ordering her redelivery, it treats the fund for all ordinary purposes as the subject on which subsequent decrees will operate. The advantage to the owner is obvious. This procedure substitutes for such a wasting asset as a ship, which in either event he cannot use, a money fund in Court, which possesses a relative stability and suffers no wear and tear. Their Lordships' conclusion is that under the sixth Convention the subjects to be restored are the *Prosper*, being a ship which is in specie, and the appraised values of the *Blonde* and *Hercules*, which were lost. No question as to freight was raised before their Lordships.

A further point may be briefly disposed of. It was that in all cases where a ship is requisitioned otherwise than "temporarily" under r. 6 of Order XXIX., the substitution of the appraised value for the ship is definitive, and no order can thereafter be made to take the ship herself out of the possession of the Admiralty. There is no authority for this. It is not supported by the special provision for a temporary, as distinguished from a general and indeterminate, requisitioning, which was only introduced by amendment into Order XXIX. some considerable time after the beginning of the war, nor does the provision that such requisitioning may be without appraisement preclude the power of ordering appraisement, when on the destruction of the vessel it becomes necessary that a fund should be determined which will represent her. It is opposed to the nature of requisitioning, which is for the use of His Majesty (including, no doubt, consumption in the case of goods whose normal use consists in using them up), and would confound a thing requisitioned for use with a thing acquired for the purpose of sale. Furthermore, in cases where release in specie is the right of a claimant, the Court might prove to have disabled itself from making the due decree, if a mere order for leave to requisition were to operate as a final abandonment to the Crown. Apart from the Treaty of Versailles, their Lordships conclude that the *Prosper* must, as a matter of form, be restored by the Admiralty to the custody of the Marshal, in order that she may be released to the owners in specie.

The provisions of the Treaty of Versailles, which are invoked to the contrary, are twofold. There can be no doubt that Germany was competent, on behalf of those nationals who were German subjects within the operation of the Treaty, to make cessions which would bind them and effect a transfer of their rights of property, as if the cession had been made personally by the owner concerned. By art. 1 of annex 3 of Part VIII. of the Treaty Germany ceded to the Allied and Associated Powers all vessels of 1600 tons gross and upwards and a part of those under 1600 tons, and by para. 8 she further "waived all claims of any description against the Allied and Associated Governments or their nationals in respect of the detention, employment, loss or damage of any German ships," with an exception not now material. By art. 440 Germany further recognized as valid and binding all decrees and orders concerning German ships and goods made by any Prize Court of any of the Allied and Associated Powers.

In their Lordships' opinion, while annex 3 operates to transfer the property in all ships of 1600 tons gross and upwards, it makes no such transfer in the case of ships of less tonnage, at least until they have been selected for surrender as part of those which under the Treaty are to be handed over. It is not suggested that the vessels in question have been so selected, and accordingly in their case this provision of the Treaty does not affect the owners' rights to restoration in specie. Had they been over 1600 tons the property and rights of the owners would have been transferred by the operation of the Treaty, and they would have had no locus standi to appeal against any order dealing with them or with the money in Court or to be brought into Court after appraisement in substitution for them. Art. 1 of the annex 3 to Part VIII., being a cession by the German Government, "so as to bind all other persons interested," not only binds the German shipowners as persons interested in appraised values brought into or to be brought into Court, but also binds them in respect of their property in the ships, which, until duly divested by a decree having that effect, remains in them, even though it may be liable to be divested at any time; accordingly it would be an answer both in regard to detained ships still in specie, whether remaining in the custody of the Court or under requisition, and to the funds, which represent them under the practice of the Court.

Their Lordships further think that para. 8 does not affect the matter. It would be otherwise if the appraised value were regarded, not as a substitution for the requisitioned res, taking its place when lost, but as a payment in consideration of being allowed to requisition at all, for in that case there might be a claim, which para. 8 would bar. Their Lordships, however, reject this view. The owners of these detained ships have no claim against His Majesty's Government either for detaining or for using the vessels. Both were regular proceedings taken as of right under regular decrees, the validity of which Germany recognizes by the Treaty of Peace. The loss of the vessels gave no claim, for the owners' rights arise not out of the loss, but out of the substitution of the appraised values for the ships, the release of which is the indemnity which the Convention provides for. There is therefore in this case nothing to waive.

The Treaty of Versailles contains a further provision (art. 297), not specially applicable to shipping, by which the Allied and Associated Powers reserve the right to retain and liquidate all property within their territories belonging to German nationals or companies controlled by them at the date of the coming into force of the Treaty, the liquidation to be carried out in accordance with the laws of the Allied or Associated State concerned. It has been urged on the one hand and denied on the other, that an answer can be found to the claim of the Danziger Rederei Aktien-Gesellschaft for the release of these vessels in the application of this article to the ships and funds in question. Beyond observing that the contentions raised on both sides deserve full and careful consideration by the appropriate tribunal, their Lordships do not feel called upon to express any opinion about them, for they are satisfied that the Prize Court is not such a tribunal. Nor do the terms of the Armistice affect the matter. It is enough to say that art. 30, which was cited, does not purport to touch the obligations of the Crown under the sixth Hague Convention, when duly determined by a Court of Prize, whether before or after the conclusion of hostilities. It merely put it out of the power of Germany, when delivering the ships demanded, to insist on an anticipation of the actual end of the war by delivery of the detained German ships forthwith.

As soon as the conclusion has been arrived at that under the treaty obligations of 1907 this country is bound to restore the res, whether now existing in specie or only in the form of a substituted fund, the duty of the Prize Court prima facie is to give effect to that obligation and thereby to discharge itself and its officials from further custody of or control over it. The decision of course involves a duty to ascertain that the private party claiming is a party presently entitled, who has not, by his own act or by the public act of those who bind him, been divested of his rights of ownership or of possession. Where rights and claims arise out of the way in which the prize has been dealt with prior to the decree for its release and the execution of that decree, no doubt the Prize Court retains its jurisdiction over them, notwithstanding that the res no longer remains in its custody. Here, however, there is no such case. Whatever rights may have been reserved to His Majesty, as one of the Allied and Associated Powers, to liquidate these ships or their value, they have not, so far as their Lordships have been informed, been hitherto put in force. The right referred to is not the right, existing independently of and prior to the Convention of 1907, to claim condemnation of these ships in prize in accordance with the law of nations, nor is the reservation of it equivalent to the discharge of the restrictions, which the sixth Convention imposes. It is a right to liquidate in accordance with municipal law, that is to say a new right, which does not become effective unless and until it is exercised. If this were to be done hereafter, it would be a new act not arising out of dealings with the prize as prize, not modifying the rights of ownership as they now exist, and therefore it would be cognizable by some other tribunal. Their Lordships are clearly of opinion that the Treaty of Versailles, which neither names nor seems to consider the sixth Hague Convention, does not in this article modify or annul the obligations which arise under it. So much they decide, but no more : the rest is open and, apparently, in accordance with the terms of art. 297, is cognizable by the High Court of Justice. As this potential claim has been brought to their Lordships' attention, they think that under any order of release the res should not be removed out of British territory for a reasonable time, lest otherwise the Treaty right might be defeated ; but they see no reason for delaying the grant of a decree for release, since no ground remains for continuing the responsibilities of the Prize Court or prolonging its possession. The right course will be to release the res physically to the Public Trustee as Custodian of Enemy Property, or to such other officer as may be discharging such duties, to be retained by him for a reasonable time free of expense to the claimants, say for six months, in order that the Crown may have the opportunity of commencing proceedings if so advised, and in that case further until the final determination of those proceedings, but in any other case to be thereafter forthwith delivered up to the claimants.

It is unnecessary to express any opinion as to the appellants' claim to a special position as a company registered in and under the laws of the Free City of Danzig except as to one point. It was urged that a Court of Prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity ; hence as against the subject of a newly constituted State, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the Treaty, which does not deal with their rights but is directed to another and a very different object. Their Lordships think the contention groundless.

In the result the appeals succeed with costs; the decrees of condemnation should be set aside; the matter should be remitted to the Prize Court to make such orders as may be necessary for the appraisement of the *Blonde* and the *Hercules*, and to make a decree releasing those appraised values and the *Prosper* in specie to the custodian of enemy property to be delivered up to the claimants, if after the lapse of six months no proceedings have been begun for an order for delivery up to the Crown, but otherwise to abide the final determination of such proceedings. There is also an appeal by leave from the President's refusal of a rehearing, as to which nothing need be said beyond formally dismissing it.

Their Lordships will humbly advise His Majesty accordingly.

The *Rabenfels*, the *Werdenfels*, the *Lauterfels*, the *Aenne Rickmers*, the *Gutenfels*, the *Barenfels*, the *Prinz Adalbert*, the *Kronprinsessin Cecilie*.

In these cases their Lordships, at various dates in the earlier part of the war, made orders on appeal that the ships should be detained until further order. (1) All were over 1600 tons.

The owners in the first, second, third, fifth, and sixth now petition that orders be made for the release of such as remain and for payment of the appraised values of such as are lost, while the Crown petitions in all that orders condemning both may be made.

The relevant considerations have been fully dealt with in the case of the *Blonde* and other ships. In the case of ships of this size the Treaty of Versailles operates as a transfer of the former owners' rights, nor have they any locus standi before the Board to discuss how the Allied and Associated

---

(1) E.g. [1916] 2 A. C. 112; [1918] A. C. 500 and 501*n*.

J. C.
1922
THE BLONDE.

Powers may deal with them inter se. The petitions for release should be dismissed with costs.

As their Lordships understand that His Majesty's Government have come to arrangements with the Allied and Associated Powers with regard to the shipping surrendered and transferred under the Treaty, and that no question now arises as between them in relation thereto, they think that the proper course is to discharge the orders for detention previously advised by their Lordships; and to release the vessels to the Crown as the present owner.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for shipowners (appellants and on petitions): *Botterell & Roche.*

Solicitor for Procurator-General: *Treasury Solicitor.*

[HOUSE OF LORDS.]

H. L. (E.)*
1922
Feb. 21.

HENRY BUTT AND COMPANY, LIMITED APPELLANTS;

AND

WESTON-SUPER-MARE URBAN DISTRICT COUNCIL . . . . . . RESPONDENTS.

Highway—Repair—Extraordinary Traffic—Excessive Weight—Substitution of Mechanical Traction for Horse Traction—Highways and Locomotives (Amendment) Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23*—Locomotives Act,* 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

The appellants, who were quarry owners in the neighbourhood of a residential town, had for many years conveyed lime and coal to and from the town by a country road. In 1913 they substituted a steam wagon and trailer, which, when loaded, weighed in the aggregate twenty tons, for horse-drawn wagons of a maximum weight of three tons, and in 1916 they introduced on to the road a second steam wagon and trailer. There had been no abnormal increase in the volume of the appellants' traffic. In recent years the substitution of mechanical for horse traction by quarry owners had become general in the district.

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

In February, 1917, the respondents, the urban authority, brought an action against the appellants to recover extraordinary expenses alleged to have been incurred by them during the previous twelve months in repairing damage caused to the road in question by excessive weight and extraordinary traffic by reason of the appellants' user of the road. This road was not a main thoroughfare and was not made up so as to bear the excessive concentrated weight of the appellants' steam wagon and trailer, and, apart from the appellants' traffic, heavy motor traffic had not become part of the ordinary user of the road:—

Held, that, having regard to the character of the particular road, the use by the appellants of the steam wagon and trailer constituted extraordinary traffic thereon in 1913, and that the continuance by the appellants of that mode of traction since 1913 had not altered the character of the traffic.

Decision of the Court of Appeal [1919] 2 Ch. 1 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Eve J. (2)

The facts are fully stated in the report of the case before Eve J. and also in the judgment of Viscount Finlay, but the following outline of the case may be useful.

The appellants were the owners of a limestone quarry on the outskirts of Weston-super-Mare.

In February, 1917, the action was brought by the respondent authority against the appellants under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to recover extraordinary expenses alleged to have been incurred in repairing the Bristol Road and Upper Church Road, and two other roads in the respondents' district, as to which there was no appeal, by reason of the damage caused by excessive weight and extraordinary traffic thereon in respect of the appellants' user of the roads within the period of twelve months prior to the date of the writ. The Bristol Road was used by the appellants for the carriage of limestone and lime from the quarry to the railway station at Weston-super-Mare, and Upper Church Road and the Bristol Road were used by them for the carriage of seaborne coal from the wharf to the quarry. The roads in question were not the main highway out of Weston-super-Mare to Bristol. It was not shown that there had been any abnormal increase of the volume of the appellants' traffic, but the gist of the complaint was that the appellants, who had previously used exclusively horse-drawn vehicles for the conveyance of their goods, had recently substituted a steam wagon and trailer for that purpose, and it was contended that this change in the mode of transport constituted extraordinary traffic over the roads in question.

---

(1) [1919] 2 Ch. 1.

(2) [1919] 1 Ch. 11.

Eve J., on the authority of *Hill* v. *Thomas* (1), decided this question in favour of the respondents, and the Court of Appeal (Swinfen Eady M.R., Warrington and Scrutton L.JJ.) affirmed his decision.

When the appeal originally came on for hearing in June, 1920, their Lordships remitted the case to Eve J. to try the following question of fact: "Was the traffic in controversy of such a nature, having regard to the character and functions of the roads in question and all the circumstances of the case, as was reasonably to be anticipated on these roads?" Eve J. reported as to the Bristol Road that in 1913 (when the steam wagon and trailer were first used) the traffic in controversy was not reasonably to be anticipated, but that considered in relation to the position of matters at the beginning of the year 1916 (the year for which the extraordinary expenses were sought to be recovered) such traffic was at that time reasonably to be anticipated; and as to Upper Church Road that the traffic in controversy ought not at any relevant time to have been reasonably anticipated.

1922. Jan. 17, 19, 20. *Upjohn K.C.* and *Jowitt* (with them *J. P. Hodge*) for the appellants. It is not suggested by the respondents that the volume of traffic carried by the appellants has increased in any abnormal degree, but the gravamen of the complaint is that there has been a change in the mode of user of the road by the substitution of a steam wagon and trailer for horse-drawn vehicles. This change occurred in August, 1913, but mechanical transport for heavy traffic had been introduced in Weston-super-Mare prior to that date. A mere change in the mode of transporting an existing volume of traffic does not constitute

(1) [1893] 2 Q. B. 333.

extraordinary traffic, provided first, that the new method is that which is being generally adopted for traffic of that character, and secondly, that the vehicles used are of proper up-to-date construction. Extraordinary traffic may become ordinary in the course of time and the obligation of the road authority changes and expands accordingly. As Lord Atkinson says in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (1): "It is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change"; and see *Attorney-General* v. *Great Northern Ry. Co.* (2), per Lord Buckmaster; *Ledbury Rural Council* v. *Somerset* (3); *Billericay Rural Council* v. *Poplar Union.* (4) It is the duty of the road authority, as it is the right of the tradesmen using the roads, to march with the times. If, apart from the mode of haulage, the traffic is ordinary, the question whether the mode of haulage changes the character of the traffic depends upon what has become the ordinary and accepted mode of haulage for traffic of that description in the district, and if by the general usage of mankind in the country generally or in the neighbourhood the new mode of haulage has ceased to be extraordinary, it is not to be considered with regard to the particular road: *Billericay Rural Council* v. *Poplar Union* (5), per Channell J. The evidence shows that the use of mechanical transport, such as that used by the appellants, for quarry traffic had become general, if not universal, before 1913, and that in 1913 there was a great deal of mechanical transport in Weston-super-Mare itself, and in the relevant year 1916–17 this mode of traction had become ordinary on the roads in question. The traffic itself has been long continued and is ordinary; the only difference is in the change of mode in which that traffic is carried and that change of mode is in accordance with the normal development in the methods of haulage. The mere fact that the traffic causes additional expense is no proof that it is extraordinary: *Billericay Rural Council* v. *Poplar Union* (1), per Fletcher Moulton L.J. *Hill* v. *Thomas* (2) was a case of exceptional volume of traffic and, though some of the dicta in that case may require consideration in view of the revolution which has occurred in the methods of haulage since the date of that decision, in point of decision it does not touch the present case. There is here nothing more than an ordinary development of the volume of traffic and of the mode of haulage: Pratt and Mackenzie's Law of Highways, 16th ed., p. 541, note (*i*).

---

(1) [1915] A. C. 654, 665.

(2) [1916] 2 A. C. 356, 366.

(3) (1915) 84 L. J. (K. B.) 1297.

(4) [1911] 2 K. B. 801, 813; 80 L. J. (K. B.) 1241.

(5) 80 L. J. (K. B.) 1241, 1244.

[They also referred to *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (3); *Etherley Grange Coal Co.* v. *Auckland District Highway Board* (4); *Whitebread* v. *Sevenoaks Highway Board* (5); *Geirionydd Rural Council* v. *Green.* (6)]

Macmorran K.C. and *J. Scholefield* for the respondents. Bowen L.J., in delivering the judgment of the Court of Appeal in *Hill* v. *Thomas* (7), deals with every aspect of the law of extraordinary traffic, and he shows that extraordinary traffic includes a change in the mode of the user of the road so as to increase the burden imposed by ordinary traffic on the road. The traffic complained of in this case comes under that head. The road in question was strong enough to bear the appellants' distributed horse traffic, but was not strong enough to bear the concentrated weight of traffic resulting from the substitution of a wagon and trailer weighing when loaded some twenty tons. The appellants' argument that the road on which the traffic complained of occurs is not to be considered disregards a whole string of authorities. The contrary is laid down in terms in *Etherley Grange Coal*

---

(1) [1911] 2 K. B. 813.

(2) [1893] 2 Q. B. 333.

(3) [1916] 1 A. C. 291, 302.

(4) [1894] 1 Q. B. 37.

(5) [1892] 1 Q. B. 8.

(6) [1909] 2 K. B. 845.

(7) [1893] 2 Q. B. 333, 340.

Co. v. *Auckland District Highway Board* (1) where Kay L.J. treats *Hill* v. *Thomas* (2) as having decided the very point, and the same point is involved in *Lord Aveland* v. *Lucas* (3); *Geirionydd Rural Council* v. *Green* (4); *Billericay Rural Council* v. *Poplar Union* (5); and *Barnsley British Co-operative Society* v. *Worsborough Urban Council.* (6) In *Ledbury Rural Council* v. *Somerset* (7) Buckley L.J. in explaining the meaning of the term "extraordinary traffic" says: "It may be outside the ordinary as being traffic of a kind such as is not normal upon the road in question; for instance, traffic by traction engines when such traffic was not normal or known upon the road before." Although motor traffic has now become usual, if this new method is introduced on to a road which is not fitted to bear it, then it is extraordinary traffic. It is lawful for a trader to put traction engines on any road he chooses, but if he puts them on to an unsuitable road he is liable qua that road for extraordinary traffic. It is not the duty of the road authority to anticipate extraordinary traffic. The road in question is not the main road to Bristol but is a country lane. The fact that this is the only road which the appellants can use has no effect upon the question whether this is extraordinary traffic: *Barnsley Co-operative Society* v. *Worsborough Urban Council* (6): nor does the fact that the appellants have continued this traffic for two or three years convert this traffic into ordinary traffic, having regard to the nature of the other traffic on the road.

Upjohn K.C. in reply. The Court is not limited to a consideration of the traffic on the road in question, but is at liberty to consider what is taking place in the country generally or on other roads in the district. Under all the circumstances of the case it was the duty of the road authority to make up the road so as to bear the traffic complained of, that being the ordinary traffic on roads of this description, although the method of carrying goods such as those conveyed by the appellants by mechanical traction had not hitherto been employed on this particular road.

---

(1) [1894] 1 Q. B. 37, 42.
(2) [1893] 2 Q. B. 333.
(3) (1880) 5 C. P. D. 351.
(4) [1909] 2 K. B. 845.
(5) [1911] 2 K. B. 801; 80 L. J. (K. B.) 1241.
(6) [1916] 1 A. C. 291.
(7) 84 L. J. (K. B.) 1297, 1304.

The House took time for consideration.

1922. Feb. 21. VISCOUNT HALDANE. My Lords, this was an action brought by the respondents, who are the local authority having control of highways within their district, to which I shall refer later, to recover from the appellants expenses for repairing damage to these roads caused by the haulage of lime, limestone and coal by steam wagon and trailers over the roads. The action was brought under s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

This statute, by s. 28 and subsequent sections, places certain restrictions upon the types and user of locomotives to be employed on highways. By s. 24 the statute enables unnecessary highways to be declared to be no longer repairable at the public expense. I refer to these sections merely as showing that it does not to-day follow from the principle that a highway authority is in general bound to keep its highways in such a state of repair as to accommodate all ordinary traffic that it will remain in every instance bound to do so. But the most important section for the purposes of the litigation before us is s. 23. It enacts that: "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid. Provided that any person against whom expenses are or may be recoverable under this section may enter into an agreement with such authority as is mentioned in this section for the payment to them of a composition in respect of such weight or traffic, and thereupon the persons so paying the same shall not be subject to any proceedings under this section."

My Lords, these words appear to render it not unlawful for the person concerned to use the highway, subject to the provisions of the other sections to which I have referred, for traffic causing excessive weight, or extraordinary traffic, but on the condition of making compensation for damage done or payment of a composition. The damage is in this event damnum absque injuria, and the power to recover compensation for it is the creation of s. 23. In these proceedings no case based on nuisance or on anything else than a claim for extraordinary expenses within the meaning of s. 23 is before us.

By the Locomotives Act of 1898 it was provided by s. 12 that expenses under s. 23 of the Act of 1878 are not to be recoverable summarily, but are to be recovered, if exceeding 250*l.*, in the High Court, and, further, that proceedings to recover them are to be commenced within twelve months from the time of the damage done.

What took place in the present case was this. The claim of the respondents was made for extraordinary expenses alleged by them to have been incurred in repairing damage caused by excessive weight and extraordinary traffic of the appellants' vehicles during twelve months prior to the issue of the writ. The roads alleged to have been thus damaged were the Bristol Road, the Upper Church Road, the Arundel Road and Park Place. What was said was that about August, 1913, the appellants began to use on the Bristol Road and the Arundel Road a steam wagon and trailer of unusual weight, and that in January, 1916, they used on the same roads a second wagon and [trailer of the same kind. As to Upper Church Road and Park Place, it was alleged that in 1916 the appellants used the wagons and trailers on these roads also. In all cases heavy loads of lime, coal and other materials were said to have been hauled in the vehicles. The writ was issued on February 21, 1917. The action was tried before Eve J., who held the appellants liable for 280*l.* in respect of damage to the Bristol Road, the Upper Church Road, and Park Place, but dismissed the claim in respect of the Arundel Road. As to the damage for which the appellants were held liable, the learned judge reduced the claim in each case by the amount of such expenditure as he attributed to reasons other than that of making good wear and tear caused by the appellants. He gave judgment, in the case of the Bristol Road for 30*l.*, in the case of the Upper Church Road for 210*l.*, and in the case of Park Place for 40*l.* The claim to the Arundel Road he dismissed on the ground that no part of the expenditure which had to be made within a year prior to the commencement of the action was attributable to the action of the appellants.

In the Court of Appeal this judgment was affirmed. The appellants do not appeal as regards the 40*l.* awarded in respect of Park Place, and the only questions which were before your Lordships were those as to the Bristol Road and the Upper Church Road.

The appeal came before this House in June, 1920. Your Lordships agreed in the view that the findings of fact by Eve J. were not sufficiently specific as to the character of the traffic and the roads themselves, and directed the appeal to stand over with a view to having the following further question of fact tried by the learned judge, the finding to be reported directly to this House for the purposes of the further hearing of the appeal: "Was the traffic in controversy of such a nature as, having regard to the character and functions of the roads in question and all the circumstances of the case, was reasonably to be anticipated upon those roads?" Eve J. has now tried the question further and has reported in the form of a declaration that "as to the Bristol Road prior to August, 1913, the said traffic in controversy was not reasonably to be anticipated, but considered in

H. L. (E.)
1922
HENRY BUTT & Co.
v.
WESTON-SUPER-MARE URBAN COUNCIL.
Viscount Haldane.

relation to the position of matters at the beginning of the year 1916 such traffic was at that time reasonably to be anticipated." As to Upper Church Road the learned judge has reported that "the traffic in controversy ought not at any relevant time to have been reasonably anticipated."

My Lords, the appeal before us relates only to the Bristol Road and to the Upper Church Road, and to a sum of 30*l.* in respect of the former and to one of 210*l.* in respect of the latter. The Bristol Road runs along the side of a hill from Weston-super-Mare towards Bristol. At one time it may have been the chief highroad between these places, but long before 1913 it had been superseded for this purpose by the more convenient Locking Road lying to the south. After this latter road was freed from turnpike toll about 1882 the Bristol Road assumed a secondary position. Among the purposes for which it was used was the conveyance of stone and lime from the limestone quarries on the adjacent hillside. There was also a good deal of horse-drawn and light motor and bicycle traffic, but even in 1916 little heavy motor traffic excepting that of the appellants. The appellants owned a limestone quarry and kilns on the hillside, but it does not appear that the hillside generally is of the character of a quarrying area. The respondents also own certain quarries on it, from which they now obtain part of the stone used, not to any substantial extent to-day for building, but for the repair of their highways. The appellants, however, use their quarry more extensively. They burn lime and they carry this, together with stone, to the Great Western Railway Station, which is situated at the south-west end of Weston-super-Mare, for transport. The quarry of the appellants is on the hillside above the Bristol Road; their practice is to carry the stone and burned lime from the quarry down the Bristol Road and the Upper Church and other roads, as to which there is no question now before us, to the railway station. Their vehicles also travel to a seaside quay, from which they carry coal for use at the quarry.

My Lords, I am satisfied by the evidence that since 1913 there has been a material increase, not only in the amount of stuff carried, but in the size and weight of the vehicles, and that this increase has been mainly caused by the appellants. In 1913, which is, of course, outside the statutory period within which proceedings can be taken, the appellants began to use a steam wagon and trailer. Before that year they had transported their material in horse-drawn carts. In the year following the introduction of the steam wagon, the total amount carried by the appellants was raised to over 25,000 tons, nearly double the corresponding amount in the previous year. Out of this amount, nearly 7000 tons were carried by steam. In 1915, 13,000 tons were so carried, and in the year ending March 31, 1916, when the total amount carried had fallen to about 23,000 tons, 15,000 were carried by steam. In January, 1916, the second steam wagon and trailer had been added by the appellants. Each of these sets of wagons and trailers, when loaded, weighs about twenty tons, a weight which is much greater than that of the old horse-drawn wagons when loaded. It is not in controversy that the use of such steam wagons is desirable for commercial reasons. Quarry owners are adopting them generally elsewhere, and it is natural that the appellants should desire to substitute them almost, if not altogether, entirely for the old horse-drawn wagons. The question is whether they can do so, having regard to the character of the two roads in question, without coming within s. 23 of the Highways and Locomotives Act of 1878. The Bristol Road and the Upper Church Road, as I have said, are not the main highway out of Weston-super-Mare. They are roads chiefly traversed by people coming from and returning to the village of Milton, which lies to the east of that town, and by motor-cars, taxicabs, and other conveyances which take residents and visitors to the houses on the hillside and to golf links. Besides this, the main heavy traffic is the carriage of stone and lime. The Bristol Road had apparently become, down to 1908, little more than a country lane. In that year it was made up as a water-bound limestone road and was re-surfaced in 1912 and again in 1915. It was also tar sprayed. But it does not appear to have been laid out for such heavy traffic as the appellants have brought upon it. The same thing is true of the Upper Church Road. I think that it is clear that the action of the appellants, during the twelve months preceding the issue of the respondents' writ, had led to the necessity for extra repairs by the latter, and to extra expense. The figures representing the amount of extraordinary expenditure necessitated by the effect on the roads of the traffic in controversy brought over them by the appellants may be taken to have been proved to amount to the 240*l.* for which there has been judgment.

My Lords, the relevant question about these facts arises in connection with the interpretation of s. 23. Was the expense incurred by the respondents in repairing the two roads the consequence of the detriment to their structure caused by the concentrated weight of the appellants' traffic passing along them, and also an expense which was beyond the average cost to the respondents of repairing highways in the neighbourhood, and cost due to weight which was excessive or to traffic which was extraordinary, so as to amount to something beyond the average standard in the cases of these highways? Now it is not denied that the duty of the road authority is to keep every highway under its control fit to accommodate the ordinary traffic which passes or may ordinarily be expected to pass along it. Such ordinary traffic may change in course of time, and the road must be made and kept suitable to serve such changing requirements. But does it follow that traffic which is ordinary on some particular main or other road in the neighbourhood which has been made specially fit for it is necessarily to be taken as the ordinary traffic forming the standard in the case of a different kind of road near? I cannot think so. A country lane may be a highway and yet not a main road. The language of s. 23 itself recognizes this. It can hardly have been the intention to compel the authority to put every country lane in such a condition as to be able to carry traffic which only a main road can bear. But, if so, the words "average expense" must be construed, in order to meet such a case, distributively, as referring to the average in the cases of neighbouring highways which are similar to the one in question, and not as laying down a rigid standard to be ascertained by that of the most strongly constructed road in the vicinity. What, for instance, might possibly be the test in the case of Locking Road, the de facto main road to Bristol, is not necessarily the test for another road leading towards Bristol which may have assumed in course of time a much less important character. The finding of fact of Eve J., in answer to the questions your Lordships referred to him, shows that in the case of the Bristol Road no such heavy traffic as that in question was to be anticipated in 1913, although in 1916, in consequence of the action of the appellants, it was reasonably to be anticipated as likely to reappear in point of fact.

It is clear from the evidence that the only reason for the change of circumstances was the action of the appellants themselves, and it does not follow, because they cannot be sued for expense which has had to be incurred in respect of any period prior to 1916, that therefore what they did then either gave them a right to continue to do it without paying for fresh damage caused to the road or altered the nature of the regular and general traffic on the road. The traffic does not in such a case become ordinary traffic, and there appears to have been no other traffic of the kind.

My Lords, even if the question of interpretation were one unaffected by authority, I should come to the conclusion that the expenses to which the respondents have been put in the cases of the Bristol and Upper Church Roads were extraordinary within the language used in the section. But I think that there are authorities which, in themselves, go far towards establishing this conclusion. I need refer only to two of these authorities. To begin with, this House, in *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (1), laid down that s. 23 means that the mere fact that the road in question is the only road which could possibly be used for the particular traffic is not relevant for the purpose of preventing the section from being applicable.

(1) [1916] 1 A. C. 291.

The question whether the traffic is extraordinary has to be treated as one merely of fact, and the motive determining the person who uses it, and is sought to be charged under the statute, is unimportant and beside the point. This decision disposes of the argument, urged from the Bar in the present appeal, that the appellants had no way of getting their new vehicles to their destinations other than one along the highways in controversy. The circumstance does not stand in the way of their having to pay for the privilege. In *Hill* v. *Thomas* (1) Bowen L.J., in delivering the considered judgment of the Court of Appeal, including Lord Esher M.R., Kay L.J., and himself, decided that extraordinary traffic, in the sense of the words used, meant "a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time or user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road." He pointed out that the relief was given in respect of exceptional user, and therefore in all cases in which the burden on the road was increased, as shown by the language of the statute in treating extraordinary traffic as meaning more than mere excessive weight, and the word "extraordinary" as applicable to what is unusual in amount. The purpose of the Act was not to prevent only unlawful user. It was to provide for damage caused by legitimate and proper user, and this aim was remedial and recuperative, intended to reach those who carried ordinary articles but not in the manner or on the limited number of occasions on which other people carried them, and so that a reason was constituted why such carriers should pay more than their neighbours.

My Lords, I think that the words of s. 23 are so selected as to show the intention of the Legislature to bring such traffic as that of the appellants within the principle of the section as soon as it is shown that it has caused extraordinary expense for repair to the road in question to fall on the road authority by reason of the excess of weight of such traffic over the average of that for roads in the neighbourhood similar to the road in question, or, analogously, of an extraordinary kind of traffic compared with that on such neighbouring roads. If this be so, the judgments in the Courts below were right and the appeal should be dismissed with costs, these costs to include those of the second hearing before Eve J.

---

(1) [1893] 2 Q. B. 333, 340–1.

VISCOUNT FINLAY (read by LORD SHAW OF DUNFERMLINE). My Lords, this case raises a question upon s. 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77). That section deals with the case of extraordinary expenses incurred in the repair of a highway in consequence of excessive weight passing over it, or extraordinary traffic upon it, and provides that the highway authority may recover such portion of the expenses incurred as arose from the damage caused by the excessive weight or extraordinary traffic.

The appellant, Mr. Butt, is the owner of a quarry, situate near Weston-super-Mare, a little to the north of the Bristol Road. It is shown on the map used on the second hearing of this case (Exhibit R. H. C. B. 6), and is thereon described as Butt's quarry. Mr. Butt has been for some years in the habit of conveying coal, lime and stone to and from his quarry in motor lorries. The routes along which this traffic has taken place have been—(1.) on the Bristol Road between a point near Butt's quarry on the east and Knightstone Slip on the west, passing over the Bristol Road, St. Joseph's Road, Corporation Road and Upper Church Road, all marked in red on the map R. H. C. B. 6, and (2.) between the said point near Butt's quarry on the Bristol Road and the railway goods station shown near the foot of the same map, passing over the Bristol Road westward as far as the point where it is intercepted by the Arundel Road, and thence by the Arundel Road, Albert Quadrant and Alfred Street to the railway goods station.

On this appeal the controversy between the parties relates only to the upper Bristol Road as far as the junction with

Arundel Road and to Upper Church Road; all the other roads have for various reasons been eliminated.

The upper Bristol Road formed at one time part of the main road of communication between Weston and Bristol. The traffic passed to and from the High Street in the vicinity of the Post Office, in the centre of Weston, along what is now known as Coombe Road, joining the present Bristol Road at a spot a little to the east of St. Joseph's Road shown on the map. In 1842 a new road, shown in purple on the map, was made, joining the Locking Road with the Bristol Road, near Ivy Lodge. This road was, until the year 1882, a turnpike road, but in that year it was freed from toll. In consequence of the existence of this new road the Bristol Road, west of Ivy Lodge, ceased to be part of the main channel of communication between Bristol and Weston, although there was still a good deal of local traffic upon it.

The Coronation Road was made in 1904, and linked up the Bristol Road with Upper Church Road and the Knightstone Slip.

Down to August, 1913, Mr. Butt's traffic was carried on by means of carts and wagons drawn by horses. Its amount was very considerable; reference may be made for the details to the judgment delivered in this case by Eve J. on July 31, 1918. In August, 1913, Mr. Butt began to use motor traffic. He used a steam wagon and trailer, the combined weight of which, when laden, was twenty tons. In January, 1916, he put a second steam wagon and trailer upon these roads. No complaint has been made of the structure of these vehicles; they were the best of their kind.

Eve J. found that beyond question the steam wagon traffic, when first put upon this road, was exceptional and extraordinary. It was a new departure, and it was attended with serious consequences to the road. The concentration of weight in the wagon and trailer did a great deal of damage, which would not have occurred if the same weight had been carried as before, distributed over a number of carts and wagons. The surface of the road was broken by this new traffic, and when the surface was once broken, a great deal of further mischief was done, even by the ordinary traffic, which would have done no damage beyond fair wear and tear if the surface over which it passed had been unbroken.

The writ was issued on February 21, 1917. The plaintiffs were the Weston-super-Mare Urban District Council, who are now the respondents, and their claim was for the recovery of the extra expense of repair in consequence of the damage done by the excessive weight of the defendant's laden wagons and trailers. The plaintiffs could recover only in respect of damage done during the twelve months preceding the issue of the writ—namely, February 21, 1916, to February 21, 1917—in consequence of the provisions of s. 12 of the amending Act of 1898 (61 & 62 Vict. c. 29), and it was strenuously contended for the appellant, Mr. Butt, that by the commencement of that period traffic of this description could no longer be regarded as of an extraordinary nature in respect of excessive weight. It was urged that since 1913, when a steam wagon was first used upon this road, such traffic had become ordinary and normal.

Eve J. gave judgment in favour of the plaintiffs as regards the Bristol Road and the Upper Church Road, and he was affirmed by the Court of Appeal on March 25, 1919. An appeal was brought to this House, and your Lordships on the first hearing of this case made an order dated June 17, 1920, that the case should be remitted to Eve J. to report to the House on the question whether the traffic in controversy was of such a nature as, having regard to the character and functions of the roads in question and all the circumstances of the case, was reasonably to be anticipated upon these roads. Eve J. accordingly heard further evidence bearing upon this question and delivered a supplementary judgment on June 15, 1921. He found that the traffic in question could not have been reasonably anticipated prior to August, 1913, but that in relation to the position of matters at the beginning of the year 1916 such traffic was at that time reasonably to be anticipated upon the Bristol Road. With regard to the other road now in question, the Upper Church Road, he found that it was not possible to hold that the traffic in controversy ought at any time to have been reasonably anticipated upon this road.

The learned judge's reasons for holding that such traffic should, in February, 1916, have been anticipated on the Bristol Road, are stated by him as follows: "By the end of 1915 it must, I think, have been reasonably clear to the plaintiff authority that Butt's mechanically propelled traffic would not be discontinued. An examination of the respective weights drawn over the Bristol Road by tractor and horse for the three years from March 31, 1913, to March 31, 1916 (see Appendix, vol. i., p. 190), demonstrates the extent to which the one mode of transport had superseded the other. Moreover, Butt's stud of horses had been dispersed or commandeered; efforts had been made on the part of the townspeople to induce him to abandon the tractor method, but, so far from yielding to this pressure, he was on the point of introducing his second wagon and trailer. If, therefore, the question has to be considered in relation to the position of matters at the beginning of 1916 the answer is that the traffic was at that time reasonably to be expected on the Bristol Road."

The finding of the learned judge, therefore, has relation solely to what Mr. Butt's course of action, with regard to this traffic, was likely to be in the year in question. There is no finding that the existence of such traffic upon the road might have been expected in consequence of the development of traffic generally, and an examination of the evidence shows that no such finding would have been warranted. In one of the plans put in on the first hearing (H. H. H. I., vol. ii., Appendix 769D), a number of quarries are shown in this neighbourhood, but the evidence is clear that all of them had been discontinued for many years prior to 1913 except the defendant's quarry and two quarries belonging to the plaintiffs in the action, the Weston District Board, the traffic to and from which latter did not pass along either the Bristol Road or the Upper Church Road.

The evidence, when analysed, comes merely to this, that the defendant found that he was able to carry on his business more economically by using motor transport, and for this reason continued the practice which he had begun in 1913.

A direction was given by this House in its order of June 17, 1920, remitting the case to Eve J., that in determining whether the traffic was to be reasonably anticipated on these roads, regard should be had to the character and functions of the roads in question. On this point the learned judge makes the following observations in his supplementary judgment of June 15, 1921: "Moreover, in connection with this point as to the functions of the roads, and throughout the inquiry, it is to be borne in mind that Weston lies quite out of the way of any through traffic between manufacturing or business centres—that the roads are not in any sense trunk roads, but constructed almost exclusively for local requirements, and further that the town is solely a health and pleasure resort without a single factory of any importance, and a place in which the passage of heavy, mechanically propelled traffic must necessarily be of a very intermittent and occasional nature."

Either excessive weight brought upon a highway or extraordinary traffic thereon may amount to a nuisance which would be indictable or actionable at the suit of those in whom the highway is vested, or of any person sustaining special damage. But in order to fall within the ambit of s. 23 of the Act of 1878 it is not necessary that there should have been any wrongful act on the part of the persons responsible for the excessive weight or for the extraordinary traffic. As Bowen L.J. said in *Hill* v. *Thomas* (1), in delivering the judgment of the Court of Appeal, "the object of the section is not to prohibit extraordinary traffic, but to lay the extra expense of damage done by such traffic to the road on the right shoulders—namely, upon those who caused the damage and to whose benefit it enured." The section does not make such use of the road wrongful, but prescribes that those responsible are to pay for the repairs rendered necessary by the damage resulting from what they did.

The judgment in *Hill* v. *Thomas* was the judgment of the whole Court, consisting of Lord Esher, Bowen and Kay L.JJ. It may be regarded as classical, and leaves very little to be said upon the law on the subject. The present is not a case of "extraordinary traffic" but of "excessive weight" within the meaning of the section. The damage to the roads in the present case was the result of the excessive weight of each motor with its load and its trailer; it was not the result of the multiplication upon the road of the number of vehicles.

---

(1) [1893] 2 Q. B. 333, 340.

Neither the Bristol Road nor the Upper Church Road were intended for such traffic, and such traffic had not become part of the ordinary use of either of these roads. The practice of one person, the defendant, cannot by itself show that to put such weight upon the road had become part of its ordinary user. If any person introduces such novelties upon the road he must be prepared to pay for the repairs to make good the damage done, and the continuance of such traffic upon the road by him and by him alone will not make the traffic ordinary so as to put an end to his liability to pay for the cost of repairs which such user renders necessary. On the other hand, if, owing to the development of the district and the increase of traffic generally, the use of such motor lorries upon a particular road becomes general, their employment may become an ordinary use of the road, and this may make it impossible to say that such motors with their loads make a case of excessive weight within the meaning of the statute. It is a question of fact in each particular case. But there is no evidence to show that any such change had occurred here, and I think that the concurrent findings of the Courts below were manifestly right.

A great deal was said on behalf of the appellant as to "the march of the times" and the great extension of motor traffic throughout the country generally. This, no doubt, is one element which may be taken into account in seeing whether any particular case falls within the provisions of the section. But the question ultimately resolves itself into this—Has the weight charged as excessive become part of the ordinary and general user of the particular road in question? If any one wishes to use a country road for the passage of heavy motor lorries which it never has borne and is not fit to bear, he is liable to contribute to the cost of repairs under this section, apart altogether from the question whether he has been guilty of the commission of a nuisance at common law, and a mere continuance of such user by the person who began it cannot by itself make it a part of the ordinary user of the road.

In my opinion this appeal should be dismissed with costs.

VISCOUNT CAVE. My Lords, I have arrived at the same conclusion.

It is established by the authorities, and particularly by *Hill* v. *Thomas* (1) and *Geirionydd Rural Council* v. *Green* (2) in the Court of Appeal and by the *Barnsley Case* (3) in this House, that the question whether traffic put upon a road is "extraordinary" within the meaning of s. 23 of the Highways Act, 1878, is a question of fact and is to be determined by a comparison of the traffic in question with that which then commonly comes upon the road.

In the present case the facts are beyond dispute. Eve J. in his first judgment found that before August, 1913 (on which date the appellants began to use tractors upon the roads), the Bristol Road, in addition to being used for the cartage of stone and lime in horse-drawn carts and wagons of the maximum weight of three tons or thereabouts, was "traversed by persons coming from and returning to the neighbouring village of Milton, by market gardeners and others bringing produce into the town, by charabancs, motor-cars, taxicabs and other conveyances taking residents and visitors to the houses situate on the hill and to the golf links, for drives into the surrounding country and by tradespeople serving the said houses": Appendix, p. 1099. These terms aptly describe the local traffic natural to a hill road adjoining a residential town. With this description may be contrasted the results of a census of the traffic over the road which was taken for a period of twenty-three weeks in the summer and autumn of 1916, and which showed that during that period the appellants' steam tractors and trailers made 3213 journeys over the road and carried 26,415 tons in weight, or an average of 1148 tons per week, the average of other mechanically drawn traffic being nine tons per week: Appendix, pp. 220, 1101. The figures for the Upper Church Road are not less striking; and there really can be no doubt that (to use the learned judge's expression) the "frequent passage of concentrated weight" to which the roads were so subjected by the appellants, was extraordinary traffic and caused extraordinary expense to the district council within the meaning of the section. On the assumption that liability is established, no question is raised as to the amounts awarded by the learned judge.

---

(1) [1893] 2 Q. B. 333.
(2) [1909] 2 K. B. 845.
(3) [1916] 1 A. C. 291.

But Mr. Upjohn, on behalf of the appellants, raises two points.

First, he says that the damage (if any) was caused, not by the increased weight of lime and other material carried by the appellants over the roads in question after the year 1913, but by the substitution of mechanical for horse traction, or in other words, that the change was not in the volume of material hauled, but in the mode of haulage; and that a mere change in the mode of transporting an existing volume of traffic does not constitute extraordinary traffic if the new method is that which is being generally adopted for traffic of that character and the vehicles used are of up-to-date construction. The assumptions of fact on which this argument rests are not fully borne out by the evidence, as the amount of lime, etc., carried over the roads after August, 1913, was greatly in excess of that previously carried; but it may well be that, if the increased amount had been carried, as before, in horse-drawn carts, the damage complained of would not have occurred. Further, it is a fact referred to in the case, and of which your Lordships might well take judicial notice, that the practice of using mechanical traction for materials of this character on suitable roads has rapidly grown in recent years. But, even if all this be assumed, it provides no answer to the respondents' case. It remains true that the appellants for the economic and effective carrying on of their business have altered their mode of traction so as to throw a new and heavy burden upon the roads; and the mere fact that in so doing they have acted reasonably from a business point of view does not relieve them from the obligation of paying for the damage caused. If, as was held in the *Barnsley Case* (1), the plea that the diversion of traffic on to an unsuitable road is absolutely necessary for the purposes of the author of the traffic is wholly irrelevant to the question whether the traffic is extraordinary, the same principle must apply to a plea that a change in the mode of traction was made reasonably and in accordance with the practice on other and more suitable roads.

But, secondly, counsel for the appellants contends that, even if the traffic complained of was extraordinary in 1913, when it commenced, it had become, by its mere repetition, ordinary in 1916–17, the year to which this claim relates; and he relies, as regards the Bristol Road, on the finding of Eve J. that, having regard to the fact that during the years 1913 to 1916 the appellants had persisted, notwithstanding the protests of the inhabitants of Weston, in the use of mechanical haulage on the roads, such traffic was, at the beginning of the year 1916–17, reasonably to be expected to continue. My Lords, I think this argument wholly untenable. If in each of the years 1913–14, 1914–15 and 1915–16 the appellants caused injury to the roads by extraordinary traffic, they came under a liability to pay for the damage so caused; and the fact that they were not sued for and did not pay such damage, and had shown an intention of continuing to cause it, did not make the traffic ordinary traffic or traffic to be reasonably expected on the roads in the sense in which that expression was used by Lord Atkinson in the *Sharpness Case.* (2) No doubt, if the general and public traffic on a road changes in character, that which was once exceptional may become ordinary; but the fact that one user of the road continues for a short period, and in defiance of protests, to damage it by extraordinary traffic without being called to account, is not sufficient to alter the ordinary character and functions of the road. The decisions in *Whitebread* v. *Sevenoaks Highway Board* (1) and in the *Barnsley Case* (2) appear to me to proceed on this footing.

---

(1) [1916] 1 A. C. 291.

(2) [1915] A. C. 654.

I agree that this appeal fails and should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I am authorized by my noble and learned friend Lord Dunedin to say that he concurs with the opinion which I now proceed to read. There are two questions in this appeal. The one is a question of law—namely, what is the proper construction to be put upon certain words occurring in s. 23 of the Highways and Locomotives (Amendment) Act, 1878? The second is a question of fact, and is whether the circumstances disclosed in evidence bring the expenses incurred in the repairing of the highway within the category of "extraordinary expenses," caused by the appellants and falling within the section. I propose to deal with these questions in their order.

On the question of law it may be as well to set out again s. 23. [His Lordship read the section.] It must be observed in the first place upon this section that it is a section to provide for reimbursement of expenses actually incurred. The importance of that in the present case is rather singular; because, so far as recovery or reimbursement is concerned, that is conditioned by s. 12 of the Locomotives Act, 1898. By sub-s. 1 of that section, it is provided that s. 23 of the Act of 1878 shall be amended, and, by (*b*), the amendment takes the following shape, that "proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which damage has been done."

It was explained to the House, and was not questioned, that, although much damage had been done in and from the material year 1913 the repair of which would in ordinary

(1) [1892] 1 Q. B. 8, 13.

(2) [1916] 1 A. C. 291.

circumstances have been undertaken in three years, yet the difficulty of obtaining labour during the Great War had caused much postponement of necessary work. In this way the sums recoverable under the present action form but a limited portion of the extraordinary expenses actually incurred, because, although the damage was continuous, say, from the year 1913 onwards, it is only for the damage done within the period of one year prior to the action that reimbursement can be claimed, that is to say, from February 21, 1916.

In the second place, while the section provides for reimbursement of extraordinary expenses, the nature of these expenses is strictly limited by their having been incurred "by reason of the damage caused by excessive weight passing along the roads or extraordinary traffic thereon." These two reasons may, of course, be read disjunctively, and individual cases of the passing along a road of a single crushing weight might fall under the first reason, while an enormous repetition of fairly heavy traffic causing destruction of the road might fall within the second reason. But I think that the two reasons are not necessarily disjunctive, and that in point of fact the present case illustrates very clearly how this is so. The individual weights carried in the present case are certainly heavy—the loaded steel tractor weighing twelve tons and the loaded trailer weighing eight tons; but, of course, such carriage might not of itself constitute traffic which, if reckoned over the season or over the year, was extraordinary in volume. I only mention this point in order to put on one side an argument for the appellant which seemed to indicate that the interpretation of extraordinary traffic must be confined simply to an ascertainment or consideration of the total amount carried. It is not so. The mode of carriage may make traffic extraordinary; and the concentration of heavy weight per one mode of carriage may, indeed, combine both elements in the section—namely, excessive weight and extraordinary traffic—while, again, the category of "extraordinary" might quite well be reached by a concentration of heavy weight whereby destruction of the road was accomplished, although the volume of traffic might not in itself be extraordinary and could have been carried by a better distributed mode of conveyance without damage to the road.

In the third place, on this construction, one has to keep in view—and this, in my humble opinion, is the kernel of the question—the point of view of the road itself. The section provides for reimbursement of expense put upon the road. The test is, did the road require this expense, on account either of the mode or the mass of traffic by particular users in particular periods? If the road did require such expense for such reason, then the conditions of liability set up by the statute are satisfied. It is another way of stating the case from this point of view to ask—Were the tear and wear of the road within the category of ordinary tear and wear or of extraordinary damage?

In the fourth place, this distinction between ordinary and extraordinary may be said very properly to be one of fact, but yet each of the contrasted items may have a legal aspect. I have already given my view of the legal considerations applicable to the term "extraordinary." As to the term "ordinary," I do not think that that is finally settled by a mere statement of the accounts of expenditure incurred in previous years. The expenditure of those years may, by neglect or by necessity, have been truly insufficient for the requirements of the district and traffic in the past, and it seems in my view to be a safe legal position that the ordinary expenditure—which is to form a datum of comparison with extraordinary expenditure—is that expenditure which would have been reasonably sufficient for the requirements in the past. In most cases the road authorities would have acted upon this footing, and if so the actual past expenditure would clear the issue.

But, further, I look upon the estimate of ordinary expenditure as properly being grounded not only upon the requirements of the road in the past, but also upon a reasonable forecast for the future, including the changes in the modes of carriage of ordinary traffic in the immediate future. To be blind to these changes and to decline to march with the times, cannot be sound administration, and, in my humble opinion, "ordinary" expenditure on roads ought to include a provision sufficiently enlightened to cope with the new and more onerous requirements of newer times and methods.

This last consideration, however, must be a general one. It must not be confused with provision for particular traffic, which it would not be reasonable to hold as merely a sample of the new general traffic on the particular road. A fortiori it would not be legitimate to introduce general traffic on roads in general as a datum of comparison. The statute speaks, if I may repeat, from the point of view of the particular road to which the comparison of extraordinary with ordinary is directed. Roads differ and are differently classified; and the particular road is that which in its contour dimensions and make has on the whole and in the past suited the needs of the locus through which it runs.

While, however, my Lords, these appear to me to be the legal considerations applicable to the construction of the section, it is, of course, manifest that they raise, in particular instances, considerations, estimates, and questions which are essentially those of fact.

Finally, on the construction of the statute, I am, of course, of opinion that the "extraordinary expenses" incurred cannot be run up against the private user so as to include more than the cost of restoration of the road into a state substantially equal to that in which it stood prior to his excessive wear and tear. The statute, in short, provides for reimbursement, but for reimbursement to the extent of restoration. In connection with this matter, however, it is to be observed that road authorities are, on the other hand, not limited when they are engaged or proposed to be engaged on the job of restoration in their operations. They may, very naturally and properly, extend the scope of these so as to accomplish substantial improvement. This in no way carries forward the responsibility of the private user for these; but, upon the other hand, it lays upon the Court, failing agreement between the parties, the duty of allocation as between restoration and improvement. It is one of the satisfactions of this case that Eve J. has proceeded upon these principles with the most careful and accurate discrimination.

My Lords, there is nothing whatsoever novel in any views of the law here set forth, although they have been articulated in deference to the detailed and elaborate argument presented to the House. On the contrary, and in particular, I think they are in conformity with the principles set forth by Lord Bowen in *Hill* v. *Thomas* (1)—an opinion which is of the first rank in authority and helpfulness. From that case down to the *Barnsley Case* (2), the authorities are really all one way. The distinction attempted in the present appeal—a distinction grounded upon the fact that this was a case in which the change was merely in the mode of user of the road—is, as it actually happens, met in terms in the course of the leading sentence in Lord Bowen's judgment, where he says (3): "Extraordinary traffic is really a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common." I need not give or repeat any analysis of these authorities, because the sentence which I have just quoted still appears to me very compendiously to express the law on the subject.

The facts of this case have been already resumed by your Lordships. I do not have any doubt that they have been correctly apprehended by the learned judge who tried the cause. I say so after having given an attentive consideration to the evidence and to the results of his thorough investigation as set forth by him. But I desire to call attention to his mode of gathering together the legal position and putting it usefully into the form of an issue to test the facts. The language he employs is this: "Whether at the time of the introduction of the means of transporting this concentrated weight there was any existing traffic imposing a burden on the road comparable with it in quantity or frequency" (to this I would add "or concentration," which is manifestly what the learned judge also means). "If there was, it may well be that the new departure, although it increases the burden on the road, does not alter it, and it is therefore only in the nature of increased ordinary traffic; if, on the other hand, there was not any such pre-existing traffic, then the innovation is not ordinary but extraordinary traffic on that road."

---

(1) [1893] 2 Q. B. 333.
(2) [1916] 1 A. C. 291.
(3) [1893] 2 Q. B. 340–1.

The issue so stated and the comment upon it were firmly challenged in the Court of Appeal and in this House. The learned judges of the Court of Appeal, however, approved both issue and comment, and I think the Court of Appeal was right.

I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs, including the costs of the hearing on remit before Eve J.

Lords' Journals, Feb. 21, 1922.

Solicitors for the appellants: *Joynson-Hicks, Hunt, Cardew & McDonald.*

Solicitors for the respondents: *Mead & Co., for S. C. Smith, Weston-super-Mare.*

[HOUSE OF LORDS.]

MURPHY AND OTHERS . . . . . . APPELLANTS ; H. L. (I.)*

AND 1922

HURLY . . . . RESPONDENT. Feb. 20.

Landlord and Tenant—Sea Wall—Agreement by Landlord to keep in Repair—Action for Damages for Breach of Agreement—Implied Condition of Notice of want of Repair.

The implied obligation of a tenant of premises which the landlord has covenanted to keep in repair to give notice to the landlord of the want of repair of the premises before bringing an action against him for damages for breach of the covenant springs from the special knowledge which the tenant's occupancy of the premises is presumed to give him, coupled with the state of ignorance in which the absence of such occupancy is presumed to leave the landlord ; and, *semble*, no such implication arises in the case of a covenant by the landlord to keep in repair a sea wall erected by him for the common protection of a number of holdings.

The plaintiffs were judicial tenants to the defendant of adjoining holdings situated near the sea coast of Kerry. The defendant, during the currency of these tenancies, erected a sea wall for the protection of the holdings from the incursions of the sea and employed a local agent to look after the wall. On the revision in 1916 of the plaintiffs' rents for a new statutory term the order of the Chief Commissioner, in the case of each tenant, was made on the basis that the landlord kept the wall in repair as theretofore. In September, 1918, the sea wall was damaged by high tides, with the result that the plaintiffs' holdings were flooded, and separate actions, which were tried together, were brought against the landlord to recover damages in respect of such floodings. No notice of any want of repair of the sea wall had been given either to the landlord or to his agent:—

Held, (1.) that the acceptance by the defendant of the enhanced rent on the basis of the condition imposed by the Land Commission was evidence of an agreement to be bound by the condition, whether that condition was authorized or not ; (2.) that in the circumstances of the case notice to the defendant of the want of repair of the sea wall was not a condition precedent to the maintenance of the actions.

Hugall v. *M'Lean* (1885) 53 L. T. 94 considered.

Order of the Court of Appeal in Ireland [1921] 2 I. R. 335 reversed.

APPEAL from an order of the Court of Appeal in Ireland. (1)

The appellants were judicial tenants to the respondent of separate holdings situate in Fenit Island in the county of Kerry, and they brought separate actions against the respondent for damages for breach of an agreement to keep in repair a sea wall built by the respondent for the protection of the tenants. The actions were tried together by O'Connor L.J. sitting as a judge of first instance without a jury.

---

* *Present :* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD CARSON.

(1) [1921] 2 I. R. 335.

The appellants respectively averred that they were judicial tenants to the respondent of the holdings in question, whereof the judicial rent payable to the respondent was fixed by the Irish Land Commission on the basis that as a condition of the tenancy in each case the respondent should keep in repair a certain sea wall adjoining the said holdings within certain limits marked by the letters A and B on the map of the lands recorded with the Land Commission ; that in breach of the said condition the respondent had failed to keep the said sea wall in proper repair, and that in September, 1918, the same became broken in several places whereby the appellants' lands were flooded and damage was caused to their pasture and crops.

The respondent, besides traversing the appellants' averments, pleaded that the appellants never gave any notice to the respondent that the sea wall was out of repair prior to the occurring of the injuries complained of. The facts are stated by Lord Buckmaster in his judgment and are summarised in the headnote.

O'Connor L.J. found that the damage complained of was mainly due to the omission of the respondent to repair the wall and he entered judgment for the appellants for damages, which he assessed in one case at 100*l.*, in another case at 25*l.*, and in the remaining four cases at 15*l.*

A motion to set aside this judgment was refused by the Divisional Court (Gibson, Dodd and Samuels JJ.), but the order of the Divisional Court was reversed by the Court of Appeal in Ireland, by a majority (Sir James Campbell C. and Molony C.J., O'Connor M.R. dissenting), on the ground that in the absence of notice to the respondent of the want of repair complained of by the appellants the actions were unsustainable, and judgment was entered for the respondent.

1922. Jan. 27, 30. *Sir Charles Mathew K.C.* and *Patrick Lynch K.C.* (with them *J. M. Fitzgerald*) (the two latter of the Irish Bar) for the appellants. The cases which decide that a covenant by the landlord to repair the demised premises must be read as a covenant to repair on notice depend upon a principle which does not apply to the facts of the present case. This doctrine has been carried by the majority of the Court of Appeal in Ireland to an unreasonable length. The dissentient judgment of O'Connor M.R., which contains an exhaustive review of the authorities on the subject, completely expresses the appellants' argument. Lord Abinger in *Vyse* v. *Wakefield* (1) states the true principle on which the doctrine rests as follows: "Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." That is a general principle which does not depend on the relation of landlord and tenant, although the question would usually arise in those cases. The test in each case is, Is it reasonable in the circumstances to imply the condition of notice? There is no universal rule requiring the tenant to give notice of the want of repair before bringing an action for breach of the covenant. Notice is only required where it would be unjust to hold the defendant liable without it: *Makin* v. *Watkinson*. (2) The strongest case against the appellants is *Hugall* v. *M'Lean* (3) and, unless distinguishable, it is submitted that it was wrongly decided. It is founded on *Makin* v. *Watkinson* (2) which, rightly understood, does not support the decision; and *Makin* v. *Watkinson* (2) in turn was founded on *Vyse* v. *Wakefield*. (1) *London and South Western Ry. Co.* v. *Flower* (4) and *Torrens* v. *Walker* (5) also proceed upon the principle of *Makin* v. *Watkinson*. (2) *Melles & Co.* v. *Holme* (6) shows the limits of the doctrine and strongly supports the appellants' contention. This sea wall was built by the landlord for the common protection of the tenants and presumably belongs to him, and he had at least as good an opportunity of ascertaining the condition of the wall as his tenants. It is not important to consider whether the landlord was in actual possession, because he had, by his agent, inspected the wall over and over again without interference. Some of the holdings abut on the wall but others do not, yet the damage done by a breach in the wall affects all the tenants alike. Who then is to give notice? And if one tenant gives notice does that enure for the benefit of all? These considerations show that notice was not a condition precedent to the enforcement of the agreement in the present case.

---

(1) (1840) 6 M. & W. 442, 452.
(2) (1870) L. R. 6 Ex. 25.
(3) 53 L. T. 94.
(4) (1875) 1 C. P. D. 77.
(5) [1906] 2 Ch. 166.
(6) [1918] 2 K. B. 100.

Serjeant Sullivan K.C. (of the Irish and also of the English Bar) and *Conner K.C.* (with them *Bernard Roche*) (the two latter of the Irish Bar) for the respondent. 1. The Land Commission has no jurisdiction to insert collateral conditions in a fair rent order, and on the facts there was here no evidence of an agreement by conduct on the part of the landlord to submit to the condition as to repair: *Bruce* v. *Steen.* (1) If any admission on the point was made by the landlord it was made under a misapprehension. 2. To render the landlord liable on his covenant there must be either notice by the tenant of the need of repair or personal knowledge by the landlord. In *Tredway* v. *Machin* (2) Collins M.R. says that the landlord is not liable on his covenant to repair unless he has had express notice of the want of repair, and he bases the rule upon the principle that the landlord, not being the occupier, has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair. He then refers to *Hugall* v. *M'Lean* (3) as an authority for the proposition that evidence of means of knowledge on the part of the

---

(1) (1884) 14 L. R. Ir. 408.
(2) (1904) 91 L. T. 310.
(3) 53 L. T. 94.

H. L. (I.)
1922
MURPHY
v.
HURLY.

landlord is not sufficient, but that there must be express notice. Here the tenants collectively have the wall under their observation and the landlord has not, and, that being so, the principle of these cases applies.

Sir Charles Mathew K.C. replied.

The House took time for consideration.

1922. Feb. 20. LORD BUCKMASTER. My Lords, the appellants in this case are tenants of adjoining holdings at Fenit Island in the County of Kerry. The respondent is their landlord.

The holdings originally ran down to the foreshore and were exposed to the incursions of the Atlantic. To provide against this danger the landlord in 1899 erected a sea wall. Whether the wall was actually built in whole or in part on portions of the tenants' holdings is not material, for there can be no doubt that it was intended to be within the control of the landlord, and if its site was upon property which the appellants originally held that site was relinquished for the purpose of its construction. The wall was built during the currency of a statutory term for which a fair rent had been fixed by the Land Commissioners. Since the date of the construction of the wall two further Orders have been made fixing the fair rent; the first in March, 1906, and the second in May, 1916. The earlier of these Orders contained the statement that the rent was fixed on the basis of the landlord keeping the sea wall on the western side of the holding in repair, and in the latter this was varied by a provision securing that the landlord should keep the sea wall in repair as set forth in the schedule, and the schedule contained the statement that "The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea wall on the western side of the Townland from 'A to B' on the recorded map." In 1914 there was a breach in the wall due to heavy weather, damage resulted to the holdings, and the tenants recovered from the landlord in respect thereof. In September of 1918 there was a strong westerly wind and the Atlantic rolled with violence against the wall, breaking it down in nine places, with considerable resultant injury to the crops and holdings of the appellants. They accordingly instituted the proceedings out of which this appeal has arisen, claiming damages for breach of the covenant to keep the wall in repair. The learned judge, O'Connor L.J., before whom the case was heard, decided in their favour, and an application for a new trial was refused by the King's Bench Division. On appeal, however, from their judgment, the judgment of O'Connor L.J. was set aside and judgment was entered for the defendant. From the Court of Appeal the present appeal has been brought.

Three questions arise for determination.

1st. Was there any, and if so what, obligation undertaken by the landlord to the tenants in respect of the wall ?

2nd. Was notice of the condition of the wall to the landlord a condition precedent to his liability on any agreement ?

3rd. Was there evidence of damage due to the non-repair of the wall on which the learned trial judge could properly act ?

The first question hardly appears to merit the very elaborate argument which it received. It may, indeed, be accepted that the Court of Land Commission had no power to impose new conditions of tenancy and that so far as they attempted to effect such an alteration their order would be inoperative ; but none the less the rent was fixed upon the basis that an agreement with regard to the sea wall existed or should be made ; and the rent was accepted upon that footing.

Repairs, some extensive and some trivial, were continuously made by the landlord from the erection of the wall down to the date of the disaster. No attempt was made to challenge the authority of the Court with regard to the stated condition, and no evidence whatever was tendered to negative what such circumstances would reasonably imply—that an agreement was in fact existing between the parties.

I am not, therefore, surprised to find that, both in the Divisional Court and before the learned judge who tried the

H. L. (I.)
1922
MURPHY
v.
HURLY.
Lord Buckmaster.

case, such agreement was admitted, and, although it is said that this statement is due to a misapprehension of the true position, I think that the admission only gives effect to the clear result of the circumstances to which reference has been made.

The agreement, therefore, is an agreement to keep in repair the sea wall between the points "A" and "B." In order to see that the wall was kept in proper condition it appears that the defendant appointed a representative, named Kelly, whose business it was to keep a watch upon the wall, but neither from him nor from any other person is there evidence that the landlord received notice that the wall needed attention until it was overthrown by the tide. I am unable to think that any such notice was necessary. The principle upon which notice is required to be given to a lessor requiring him to repair demised premises in accordance with his covenant before proceedings are taken to obtain damages for the breach is not inherent in the relationship between landlord and tenant. The doctrine depends upon the actual facts existing in each case and upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be possessed by the one party while it is by the other. If these are the conditions, it is so unreasonable to render the ignorant party liable for something which the party with knowledge has never asked him to do that it is assumed the covenant implies a condition as to notice being precedent to liability.

The earliest case referred to, that of *Vyse* v. *Wakefield* (1), had nothing to do with landlord and tenant at all.

The next, that of *Makin* v. *Watkinson* (2), to which the subsequent cases constantly refer as a guiding authority, was a case of landlord and tenant; the covenant was to repair the walls, timbers and roofs of the property. Channell and Bramwell BB. held that notice was necessary before proceedings were taken upon such a covenant, because

(1) 6 M. & W. 442.

(2) L. R. 6 Ex. 25, 28.

to use their language—" We are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition."

There are a number of authorities that have followed this principle, but there are none that affect the central underlying idea that justice requires in a covenant to repair an implication that knowledge possessed by one party, and which in the position of the parties would not be possessed by the other, must be communicated before proceedings can be taken for breach of the covenant. The strongest case in favour of the respondent is the case of *Hugall* v. *M'Lean.* (1) It was an action on a covenant by a landlord to keep in repair the drains of a house, and the jury found that the plaintiff, who was tenant, had not the means of knowing that the drains were defective, whilst the landlord had, although he did not in fact know. The Master of the Rolls held notice was necessary to establish liability and followed the case of *Makin* v. *Watkinson.* The case does not appear to have been very fully reported, and it is difficult to reconcile the decision with the findings of fact on the part of the jury, but it is easy to understand the case if it be regarded, as the Master of the Rolls appears to have thought it should, as an ordinary case of a covenant to repair part of the demised structure that was in fact in the occupation of the tenant.

None of these cases, in my opinion, have any application to the present.

The wall in question stretches over a half or three-quarters of a mile, abutting on the boundaries of various holdings, and the landlord could have, and by his agent in fact had, access to the whole. A breach in one part of the wall might cause damage affecting every holding, and a breach of any part not contiguous with the holding of a particular tenant might be just as much removed from his notice or means of knowledge as from that of the landlord. There are none of the circumstances here that render it necessary to imply

(1) 53 L. T. 94.

conditions which have never been expressed and the covenant to keep in repair must be enforced without regard to any special limitations on its operation.

Upon the question as to whether the covenant was broken and the damage was due to the breach, I have had the opportunity of reading the opinion of Lord Atkinson and I agree with his conclusions and with the reasons which he gives.

LORD ATKINSON. My Lords, I concur. It is, I think, much to be regretted that the trial in this case was conducted in such a manner that much has been left uncertain and obscure which would have been helpful had it been clearly and distinctly elicited and put in issue. I propose to consider the main questions involved, in my view, in this case in the following order: (1.) Was there evidence given at the trial sufficient to sustain a finding that the respondent had agreed with each of the appellants on May 31, 1916, to keep in repair, as theretofore, the sea wall on the western side of the townland of which their respective holdings formed part, from the points A to B on the map recorded by the order of the Irish Land Commissioners of that date? (2.) If so, was there evidence given at the trial sufficient to sustain a finding that the respondent had been guilty of a breach of this contract injuriously affecting the respective holdings of the appellants? (3.) If so, were the appellants respectively disabled from suing the respondent to recover damages in respect of this breach by reason of his not having had, before action brought, notice or knowledge that this sea wall was out of repair and needed to be repaired? (4.) Are the damages awarded excessive in amount, or have they been measured upon an improper principle?

It has been well established in the Irish Courts that the Irish Land Commission, when making orders fixing fair rents for holdings in the occupation of tenants, have no jurisdiction to introduce into an order conditions collateral to, or unconnected with, the contract of tenancy under which the holding is, in fact, held; but it is, I think, clear that if in any given case they should introduce an unauthorized condition, of such a nature as to be burdensome to the landlord, beneficial to the tenant, calculated to increase the value of the holding, and, therefore, presumably causing the rent to be fixed at a higher figure than it would have been fixed at had the condition not been introduced, the receipt by the landlord of the enhanced rent would amount to strong evidence that he had agreed to be bound by the conditions on which that enhancement was based.

It would be very unjust to the tenant to permit the landlord at the same moment to approbate and reprobate, to receive the enhanced rent and repudiate the condition leading to its augmentation.

The appellants in this case had three successive statutory terms fixed for their respective holdings. This sea wall was built by the respondent in the year 1899–1900, during the currency of the first of these statutory terms. On the expiration of this term the appellants, in the year 1906, applied to the Land Commissioners to have fair rents fixed for their respective holdings for a second term of fifteen years. On March 10, 1906, the said Commissioners made orders in the case of each of the appellants fixing the rents of their respective holdings, and introduced into each order a condition worded as follows: "The rent has been fixed on the basis of the landlord keeping the sea-wall in repair."

This condition was repeated in the pink schedule required to be framed under the first section of the Irish Land Act of 1896. It is not stated, either in the order or schedule, that this sea wall is built upon, or bounds the holdings of the appellants or any of them. It is not pretended that the rents so fixed on the basis of this condition were not paid to, and received by, the respondent during the continuance of the statutory term. In the month of March, 1914, the appellants applied to the Land Commissioners to make an order fixing the fair rents for their respective holdings for a third term, to run from March 25, 1914. On October 26 in that year that application was acceded to; but into the pink schedule attached to the orders was in each case introduced a condition somewhat different in form from that introduced into the previous orders. It ran thus: "The rent has been fixed on the basis of the landlord keeping the sea-wall on the west side of the town land in repair. Parts of the sea-wall have been broken down by a storm, but these have been rebuilt and the whole repaired during the present summer by the landlord."

When a statutory term has expired the tenant's obligation to pay the rent fixed when the term was created also expires; but the contract of tenancy does not expire. The new rent and the conditions attached to it must be refixed and recreated by a new order. If this new order contains anything in excess of jurisdiction the landlord can by proper proceedings impeach it as being made ultra vires and void in whole or, possibly, in part. The respondent did not take proceedings of that kind, but on December 10 and 11, 1914, both the appellants and the respondent served notice on the Land Commissioners requiring these applications to be reheard. These applications were acceded to, and on May 16, 1916, the Land Commissioners made an order reciting that the aforesaid notices had been served, that the case had been reheard, and that after hearing what was offered on behalf of the landlord and tenant respectively they had fixed the rent on the basis of the landlord's keeping the sea wall in repair as set out in the schedule of even date therewith. On referring to the schedules one finds the following statement: "The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair as *heretofore* the sea-wall on the western side of the Townland from A to B on the map recorded."

The object of introducing the word "heretofore" was to bring back things to the condition in which they stood during the preceding statutory term. The sea wall was broken down to a serious extent in the month of September, 1918. It has not been suggested that the respondent did not receive up to that date the rent fixed by the order of May 16, 1916. There was, therefore, in my opinion, abundant evidence to establish that the respondent had agreed with each of the appellants to repair the sea wall as provided by the condition introduced into these several fair-rent orders of the latter date.

[His Lordship then dealt with the second question and, after reviewing the evidence, expressed his opinion that there was evidence before the learned Lord Justice upon which he might legitimately come to the conclusion this wall was on September 21, 1918, in bad repair, and that the want of the proper repair of it, though not the sole cause of the breaches having been made in it with the resulting damages, was a potent contributing cause to these disasters.]

As to the third question, the necessity for giving notice before an action for breach of contract to repair could be instituted, I desire to refer to a few of the many authorities cited, with a view to consider whether the principle upon which this alleged rule of law is based can apply to a work such as this sea wall. Though covenants to repair premises are more frequently entered into by landlords and tenants than between others, the rule of law is equally applicable to the contracts of other classes of the community. In *Makin* v. *Watkinson* (1), which is subsequently treated as more or less a leading case, the lessors of a mill covenanted with the lessees that they would at all times during the demise keep the main walls, main timbers, and roof of the buildings in good and substantial order, repair and condition. The lessors failed to do so. The lessees sued them to recover damages for this breach. The lessors pleaded that they received from the lessees no notice of the breach, and this plea was on demurrer held to be good.

Channell B., in delivering judgment, said (2): "When a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd

(1) L. R. 6 Ex. 25.

(2) Ibid. 27, 28.

the covenant may be, it cannot be varied." He then proceeds to show why it would be unreasonable in the case under consideration to enforce the unqualified covenant. He said: "Now here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might, by observation, acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice." He then proceeds to show why he could have no such knowledge. He says: "He" (i.e., the lessor) "could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it." The justice and reasonableness of modifying the covenant in the lease, so as to require notice to be given to the lessor is mainly, if not entirely, based on the lessor's assumed inability to enter upon the demised premises and ascertain for himself the actual condition of the things he had bound himself to repair. This is even more strongly brought out by Bramwell B., as he then was. In his judgment, he said: "I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor: 'You shall not come on the premises without lawful cause'; and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair" (the premises) "when no repair is needed he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested," that is, that it should be read as a covenant to repair on notice. Further on he says: "If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, and the defendant can only guess or speculate about the matter, then notice is necessary." I have quoted from these two judgments at this length because almost all the later authorities rely upon them. In *London and South Western Ry. Co.* v. *Flower* (1), the bridge which the undertakers were bound to repair was in the exclusive possession of the plaintiffs. The want of repairs to it was known to them, and the defendant had no notice nor knowledge or means of ascertaining that repairs to it were necessary. Lindley J., as he then was, based his judgment on *Makin* v. *Watkinson* (2), but was careful to exclude the case of the inability of the defendants to ascertain whether or not the bridge was defective, and also to exclude the case of the mutual ignorance of the parties of the existence of the defects—a most important qualification, not without a bearing on the present case. In *Manchester Bonded Warehouse Co.* v. *Carr* (3) the lessee who sought to sue the lessor on his covenant to repair the premises was himself in possession of them, and, though bound by a covenant not to sublet them without the consent of the lessor, did sublet some of the floors in the building without consent. The lessor had no notice of any want of repair. It was held that he was not liable on his covenant. *Hugall* v. *M'Lean* (4) is a somewhat peculiar case, the report of it in the Court of Appeal in the Law Times would appear to me very imperfect. The report in the Weekly Reporter is somewhat fuller. The defendant had let to the plaintiff (a lady) a house and covenanted to keep in repair during the tenancy, amongst other things, the drains and sewers upon the premises demised. The plaintiff, on her side, covenanted that she would allow the defendant and the agents and surveyors appointed by him to enter any part of the demised premises to do any act which might be necessary in order to comply with the terms of the lease. During the tenancy the premises were flooded with sewage by reason of the drains being out of repair. The plaintiff, without giving any notice to defendant, did the necessary repairs and sued the defendant to recover the sum expended by her on the repairs. The defendant pleaded that he had received no notice of the want of repairs.

---

(1) 1 C. P. D. 77.

(2) L. R. 6 Ex. 25.

(3) (1880) 5 C. P. D. 507.

(4) 53 L. T. 94; 33 W. R. 588.

At the trial the jury found that the plaintiff did not know and had not the means of knowing the state of the drains, thus rebutting the ordinary presumption that would arise in the case of any occupying tenant; and they also found that the defendant did not know, but had the means of knowing, that the drains were in a bad condition prior to the date of the flooding. The landlord was held not to be liable owing to the absence of notice.

In *Tredway* v. *Machin* (1), decided in the Court of Appeal in the year 1904, Collins M.R., as he then was, states in very clear and simple language the principle upon which the foregoing decisions rest. In giving judgment he said: "Now, the law upon the subject has been repeatedly laid down and stated. The landlord is not liable unless there is a contract by him to keep the premises in repair; and he is not liable even in that case unless he has express notice of the want of repair. That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair."

These authorities, I think, establish that the duty of the tenant to give notice springs from the special knowledge of the need of repairs which his occupancy of the demised premises is presumed to give him, coupled with the state of ignorance of that need in which the absence of such occupancy is presumed to leave the landlord.

The case of *Torrens* v. *Walker* (2) is to the same effect. In every one of the cases cited the plaintiff was in occupation of the premises to which the covenant to repair applied.

(1) 91 L. T. 310, 311.

(2) [1906] 2 Ch. 166.

I utterly fail to see how the principle upon which they have been decided can possibly apply to such a thing as this sea wall. The wall, though three-quarters of a mile in length, is, for the purpose it is meant to serve, a unit. It is not clear whether it actually rests on, or merely bounds, the holdings of the respondent's tenants. Along the sea side of it—obviously the vulnerable side—runs a track along the foreshore to which access can be gained by three or four bohereens or lanes. The landlord and his agents have the same right as have the appellants and their agents to pass along that track, to examine carefully that side of the wall, to ascertain its condition and to see whether it needed repair at any particular place or places. The levels of the appellants' holdings have not been proved with the accuracy with which they should, and might, have been proved, but this fact is, I think, clear from what has occurred, that lands some distance from any breach that might be made in the wall, or situated on the north, south, or east of that breach, might be flooded by the tidal water which flows through the breach, as well as the holding immediately in front of the breach. So that the protection of the tenants' lands from flooding depends on each and every part of the wall through its entire length being staunch. Each of the appellants had, therefore, an interest, as, indeed, the respondent had, in each and every part of the wall being in such a condition that it would effectually resist the action of the tide. It is obvious, however, that an examination of the sea side of the wall alone would not be sufficient to ascertain whether it required repairs or not. It is here that the remarks of Bramwell B., in *Makin* v. *Watkinson* (1), apply with such force: a tenant may be able to examine the inner side of the part of the wall bounding his own holding, but he has no legal right to trespass on the holding of his neighbour for the purpose of examining another part of the wall; and, as I have already pointed out, an examination confined to the portion of it fronting one holding would be insufficient. The landlord, too, would be in precisely the position of the lessor, as pointed out by Bramwell B.

---

(1) L. R. 6 Ex. 25.

in *Makin* v. *Watkinson*. (1) He would have no legal right to go on the holdings of any of his tenants for the purpose of inspecting the wall if that tenant objected to his doing so, neither would the respondent's agent; so that the presumption upon which the right to notice is stated to depend—namely, that the tenant being in occupation has a full opportunity of seeing and knowing the condition of the premises he occupies and their need of repair, while the landlord has no such opportunity, is plainly negatived by the facts.

I think this case resembles much more closely a case in which a landlord made a road as a means of approach to the houses of several of his tenants, and covenanted to keep it in repair, than any of the cases dealt with in the authorities relied upon. If, for instance, this road was carried over a bridge constructed by the landlord and was covered by his covenant, it would, in my view, be little less than ridiculous to contend that he was not liable to be sued for the breach of his covenant to repair the bridge unless he first received notice from one of the tenants whom he invited to use it, but who was not in occupation of it. The reason upon which the right to receive such notice is based would not exist in such a case, and the rule of law mentioned by Collins M.R. would not apply to it.

I am, therefore, clearly of opinion that the respondent was bound to keep this sea wall in a proper state of repair, whether he received or did not receive notice of its need of repair, and was not entitled to receive such a notice before he was sued for the breach of his agreement.

With regard to the damages I think there is no evidence whatever to show they were excessive in amount. As to the manner in which they were measured, I concur in opinion with the Irish Master of the Rolls expressed in the following passage of his judgment: "The amount arrived at was not calculated scientifically, and I do not believe that an army of experts would have enabled the Court to arrive at an absolutely accurate figure. What is called rough justice was done —the nature of the case did not admit of anything else. The

---

(1) L. R. 6 Ex. 25.

Lord Atkinson.

defendant's neglect made him liable for damages incapable of being estimated with accuracy. He cannot escape for that reason, and he should be satisfied with a result which may be unscientific but practical."

The appeal therefore, in my opinion, succeeds. The decision appealed from was, I think, erroneous, and should be reversed and the decision of the King's Bench Division restored and this appeal allowed with costs here and in the Court of Appeal.

LORD SUMNER. My Lords, in this case, which has already twice been the subject of review, I think your Lordships cannot reasonably be expected to take a view of the facts different from that which has been adopted throughout. Partly on an admission made by the defendant's counsel, partly on evidence called before him, partly, I daresay, on the footing of matters which were tacitly treated as common knowledge and common ground, O'Connor L.J. arrived at conclusions of fact, from which I for one can feel no security in departing, and I propose to assume them to be correct without further discussion.

For convenience, all six actions were tried together, but this cannot affect the separate rights of the parties or the construction to be put on the several contracts between each tenant and his landlord. Each had the benefit of the landlord's obligation to keep in repair a specific part of this sea wall, which, like the whole wall of which it was a part, was a common protection to all six tenants. The obligation is not otherwise evidenced in writing than by the words in the "Pink Schedule" and the marking of the map. No part of the wall abutted on the holdings of two of the respondents. In the case of each of them at any rate it is plain that the obligation to repair was one extending beyond that part of the wall, which abutted on the particular holding, and arose irrespective of the particular holding, to which the defective part of the wall might be adjacent. The reason for this is, that the wall was a common safeguard against a common enemy, the sea.

Such is the configuration of the ground, that a breach, effected in one part of the wall, might lead to damage, resulting from the advance of the sea, to another and comparatively distant part of the land in question. It follows, that the obligation to repair might well arise in favour of a particular tenant, who had neither possession of nor control over the particular part of the wall, whose want of repair placed his land in jeopardy. For this reason I think it is of small importance, if of any, to decide whether the site of any part of the sea wall had ever been itself demised to any tenant as part of his holding. In two cases, at any rate, it clearly was not so. If the landlord retained possession and control, which for certain purposes he clearly did, *Melles & Co.* v. *Holme* (1) is authority for saying that he would not be entitled to notice of want of repair. In any case the point was one which the defendant should have proved, since it was material only to his defence. The oral evidence does not deal with it, and I can draw no satisfactory inference from a composite map of the different holdings, photographically reduced to so small a scale, that it is difficult to read the natural features and still more so to say where the coloured boundaries of the holdings actually run with reference to them.

This being so, the next point in the case is whether *Makin* v. *Watkinson* (2) and similar cases have any application here. The rule requiring a notice of want of repair by the tenant to the landlord, in the case of an ordinary landlord's repairing covenant for dwelling houses, warehouses and similar structures, is well settled, and no one proposes to alter or restrict it. The nature and the conditions of this rule are, however, equally well settled. As a rule of construction, which reads into the covenant words—namely, "upon notice"—which are not there, its application naturally depends on the existence of those strong circumstances of necessity, which alone justify the implication of a condition upon an obligation, which is itself expressed unconditionally. Those circumstances are (1.) that the tenant is in occupation and the landlord is not; (2.) that the tenant, therefore, has the means of knowledge peculiarly in his possession, while the landlord has no right of access and no means of knowing the condition of the structure from time to time (see per Collins M.R. in *Tredway* v. *Machin* (1)); and (3.), perhaps I may add, that the repairs of dwelling houses, however frequently required, are still casual and occasional, and not, as here, such as to demand of the landlord incessant vigilance and almost daily care.

---

(1) [1918] 2 K. B. 100.

(2) L. R. 6 Ex. 25.

In the present case, as I have said, two of the plaintiffs were not in possession of any part of the wall; none were in possession of the whole series of sections of the wall, which collectively the landlord had undertaken to repair. The agreement is one to be inferred, partly from the language used in the "Pink Schedule," on the basis of which the landlord has, from time to time, accepted the rents reserved in it; partly from the evidence of what was done under the agreement; partly from the description of the wall and the nature of the locality. It is not necessary to decide who was in occupation, for it is clear that the landlord, by his agent employed for the purpose, had access to the whole wall at all times and for all purposes connected with his obligations; that his means of knowledge of the condition of the wall were at least as ample and as timely as those of the tenants; and that, as he well knew long before the occurrence of the matters complained of, the wall was so constructed and was so exposed to regular periodic damage from spring tides and frequent storms as to require constant examination and constant small repairs. Not only were landlord and tenant on equal terms, to say the least of it, both as to knowledge and as to access, but the landlord, by his agent, was constantly in the habit of visiting and repairing the wall in discharge of his duty to repair. The inference from the evidence would be that by his agent's examination, as well as by his own knowledge of the way in which he had himself built the wall in the first instance, the landlord had knowledge,

(1) 91 L. T. 310, 311.

and not merely the means of knowledge, of the defects in the wall, which led to its giving way at the equinoctial spring tide in question. I think it advisable to make this observation, because in *Tredway* v. *Machin* (1) the Court of Appeal held, following *Hugall* v. *M'Lean* (2), that means of knowledge are not equivalent to actual knowledge for the purpose of charging the landlord. Furthermore, if the cases as to repairing covenants applied, each single tenant might fail in his action, because, a breach having occurred in a part of the wall which was not in his proximity and to which he had no access as of right, he had not given the landlord notice to repair it, being himself ignorant of the need of it, or again he might fail, because he could not show at the trial that the water, which destroyed his crops, had not entered through defects in the wall of which he had given no notice, having, in fact, no knowledge of them. I think the rule laid down in *Makin* v. *Watkinson* (3) has no application to such a case. The furthest point to which this rule has hitherto been carried is *Hugall* v. *M'Lean* (2), a decision of the Court of Appeal. There the tenant had neither knowledge of the want of repair nor means of knowledge, yet she failed to make the landlord liable, because she had not given him a notice, which she could not have given. The covenant was, however, an ordinary repairing covenant in an agreement for a lease of a dwelling house, and the Court felt bound to adhere to the established rule of construction, on the faith of which, no doubt, numbers of leases had been entered into, the maxim lex non cogit ad impossibilia notwithstanding. It is enough to-day to point out that the present is not a case of a covenant in common form in an agreement for a lease of a dwelling house, and that the defect complained of in that case was a defect in the drains of the particular house of which the tenant was in sole occupation. It would appear from the report in 1 The Times L. R. 445 that the Court felt that it was carrying the rule to its extreme limit.

There is a class of cases much more akin to the present,

(1) 91 L. T. 310, 311.
(2) 53 L. T. 94.
(3) L. R. 6 Ex. 25.

as to which the application of the rule would have been more nearly an authority than those above referred to. It must have been a matter of frequent occurrence that, in connection with building schemes for the development of urban land, or with the erection of cottages by manufacturers or colliery proprietors for their workpeople, the landlord has constructed and bound himself to maintain some private road, or bridge or drain, common to all the houses and close to them but not in the occupation of any of their inhabitants. The condition, on which such an obligation is performable, must frequently have been considered, but the industry of counsel has failed and mine, such as it is, has failed equally to discover any case, in which it has been suggested that such tenants cannot enforce their landlord's obligation, unless they have previously given him notice of the want of repair. The fact that no such contention appears to have been raised is significant. In *Miller* v. *Hancock* (1), where a landlord of a building, let out in flats, was held liable to keep in repair the common stairway, which he had not demised, there was no suggestion that he was entitled to notice. The fact that the liability of the landlord has since been declared to have rested on other grounds (*Huggett* v. *Miers* (2); *Lucy* v. *Bawden* (3); *Dobson* v. *Horsley* (4); *Hart* v. *Rogers* (5); *Dunster* v. *Hollis* (6)) does not affect the value of this point, such as it is. For my own part I think that the peculiar necessities which led to the implication of the condition of notice in the reported cases do not exist here, and therefore that this defence ought to have been rejected in the Courts below. In my opinion the appeal should be allowed.

LORD PARMOOR (read by LORD CARSON). My Lords, the appellants are tenants to the respondent, and on the passing of the Irish Land Act, 1881, held their respective farms as tenants from year to year. Judicial rents were fixed in the year 1883. During the currency of the first statutory terms, the respondent borrowed 350*l.* from the Board of Works, and built a sea wall on the western side of Fenit Island, as a protection against flooding by the sea. A second term of fair rents was fixed in 1906 by the Land Commission Court of Appeal. In each of the orders of the Court, a clause was introduced: "The said rent has been fixed on the basis of the landlord keeping the sea-wall on the western side of holding, in repair." The appellants applied to have the third term rents fixed, and in the order a clause was inserted: "The rent has been fixed on the basis that it is a condition of the tenancy that the landlord keeps in repair, as heretofore, the sea-wall on the western side of the Townland from 'A' to 'B' on the map as recorded." I will assume for the purposes of the appeal that the Land Commission had no jurisdiction to compulsorily impose a new condition on the landlord. It was argued on behalf of the respondent that a new condition had been so imposed, and that consequently the order was invalid. I think that this contention cannot be maintained, but it is not necessary further to consider it, since the liability of the respondent to repair was admitted at the hearing, and O'Connor L.J. accepted the contention on behalf of the respondent, that the measure of his obligation was to be read: "reasonable repair according to the nature and quality of the wall." In the judgment of the Master of the Rolls it is also stated (1): "The defendant did not originally assume any liability to maintain the wall, but, subsequently, when the plaintiffs applied to the Land Commission to have fair rents fixed, they were fixed by the Court on the basis that the landlord should keep the wall in repair. It was admitted that this threw on the defendant the same obligation as he would have incurred if he had entered into a covenant with each of his tenants to keep the wall in repair. It was for a breach of this obligation that the actions were brought." Although under these circumstances it is not necessary to refer to the evidence, in my opinion that evidence amply supports the admission which no doubt was prudently made after consideration.

---

(1) [1893] 2 Q. B. 177.
(2) [1908] 2 K. B. 278.
(3) [1914] 2 K. B. 318.
(4) [1915] 1 K. B. 634.
(5) [1916] 1 K. B. 646.
(6) [1918] 2 K. B. 795.

(1) [1921] 2 I. R. 361.

In September, 1918, the wall was breached by the sea. The holdings of the appellants were flooded, partly through the breaches so made, partly by inrushes of water to the south of the wall and through roadways in the wall, and there is evidence that the sea in places came over the wall. The terms of the order on which the obligation of the respondent rests contain no provision that the tenants should give notice to the landlord, that the wall was out of repair or required work to be executed in order to keep it in repair. The main question argued before their Lordships was that, although there was no provision for notice, yet an obligation to give notice should be implied as a term in the covenant, and that in the absence of such notice the respondent was not liable. In the Court of Appeal, the Lord Chancellor and Molony C.J. held that notice was required, but the Master of the Rolls gave a dissenting judgment. The rule in the construction of a written contract is that the intention of the parties is to be found in the document or documents containing the terms of the contract. It is not generally permissible either to add to, or to detract from, such terms; but there are recognized cases which allow conditions to be implied as a term in a written contract if not inconsistent with the expressed terms. It is said that the present case comes within this principle, and that the appellants cannot recover, because notice was not given to the respondent. The principle is well expressed by Lord Abinger in *Vyse* v. *Wakefield.* (1) "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the other party, this notice ought to be given."

The respondent fails to bring himself within the protection of the principle as stated by Lord Abinger. He might have known the condition of the sea wall as a whole, and certainly could have made himself acquainted therewith. As a matter

---

(1) 6 M. & W. 442, 452.

H. L. (I.)
1922
MURPHY
v.
HURLY.
Lord Parmoor.

of fact he had appointed an inspector to make observations, and to report to him from time to time, and on information so delivered had from time to time carried out repairs. On the other hand, the conditions of the sea wall were not within the peculiar knowledge of the other parties, some of whose tenancies did not abut upon it. The sea wall must be considered as a whole and not merely in reference to the special tenancies on which it abuts. It is a structure of which no part can be breached without the risk of general damage. In my opinion the principle of *Vyse* v. *Wakefield* (1), as applied to the present case, decides both, that if notice was required a stipulation for notice should have been inserted, and also, that the damage was not caused by neglect which was in any sense within the peculiar knowledge of the appellants. In *Vyse* v. *Wakefield* (1) both Parke and Alderson BB. based their decision on *Haule* v. *Hemyng*, Viners Ab. Condition (A.d) pl. 15. The next case referred to is *Makin* v. *Watkinson*. (2) In this case it was held by Bramwell and Channell BB., Martin B. dissenting, that the lessor cannot be sued for non-repair on a covenant to keep in repair the main walls, main timbers, and roofs of the demised premises unless he has received notice of want of repair. The reason of the rule and its limitations are well stated by Bramwell B.: "If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary." The respondent cannot, in my opinion, bring himself within this rule, since it is impossible to say that the want of repair could not be in his knowledge, or that he could only guess or speculate about the matter.

The next case to which reference is made is *London and South Western Ry. Co.* v. *Flower*. (3) In this case a bridge was constructed under statutory powers, in a form not unusual in private Acts of Parliament. It was a condition that it should be executed, and thereafter maintained by the defendants at their sole expense in all things, according to such approved plans, etc., under the superintendence and to the reasonable satisfaction of the engineer of the company. It was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages, and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, etc. Certain repairs became necessary to the superstructure of the bridge, which were executed by the company, who claimed to be reimbursed their outlay in so doing from the defendants although the defendants had no notice that the repairs were necessary. It was held that the plaintiffs were not entitled to recover the expenses so incurred. The case mainly depended on the terms of the special statutory provision, and does not affect the question of the liability of the respondent in the present appeal. Lindley J. says in his judgment (1): "I cannot read the 11th section of the Act without seeing that the minds of both parties are to be consulted with regard to the repairs. The defendants are only bound in a qualified manner to maintain the works, viz. according to plans, drawings, and specifications approved by the principal engineer of the company, and under his superintendence. The defendants could not do this without consulting the plaintiffs: still less could the company repair the bridge without giving notice to the defendants that it required repair, and calling upon them to repair it."

---

(1) 6 M. & W. 442, 454.
(2) L. R. 6 Ex. 25.
(3) 1 C. P. D. 77.

Manchester Bonded Warehouse Co. v. *Carr* (2), *Hugall* v. *M'Lean* (3) and *Torrens* v. *Walker* (4) are all cases of the construction of covenants between tenants in occupation of buildings and their landlords. It is sufficient, in my opinion, to say that the conditions which attach to the repair of a sea wall, erected to keep out high tides, over an area occupied by several tenants, some of whose tenancies do not abut on the sea wall, are essentially dissimilar from those which attach to covenants between a tenant in occupation of buildings and

---

(1) 1 C. P. D, 87.

(2) 5 C. P. D. 507.

(3) 53 L. T. 94.

(4) [1906] 2 Ch. 166.

H. L. (I.)
1922
MURPHY
v.
HURLY.
Lord Parmoor.

his landlord. The latest case is *Melles & Co.* v. *Holme.*(1) In this case damage was caused through a defect in the roof, which was in the possession and control of the defendants and not of the plaintiffs. It was held that there was no justification for contending that the plaintiff could not enforce the covenant in the absence of notice. I agree in the statement of the principle that where a covenant does not require notice to be given, the necessity of notice, as a preliminary to the recovery of damages, cannot be imported into a covenant where the plaintiffs have not possession and control of the buildings affected. There is no evidence that the sea wall was in the possession or control of any of the plaintiffs, and, certainly it was not in the possession or control of those who held tenancies which did not abut upon it. In *Tredway* v. *Machin* (2), referred to in the above case, Collins M.R. states the limitation of the principle that notice is required, although no provision for notice is to be found in the covenant between the occupier of the premises and his landlord. "That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair."

There is no justification in the present case for reading into the terms of the covenant the requirement of notice, or for departing from the ordinary principle, as stated by Martin B. in *Makin* v. *Watkinson* (3): "I think that when we are construing a contract we ought to adhere to its words, and not insert words not to be found in it; otherwise it is impossible for the parties to know what are the obligations they have bound themselves to, or for counsel to advise with certainty."

On the question whether there was evidence that the defendant did, in fact, allow the wall to get into disrepair I agree with the judgment of the Master of the Rolls, and desire to add nothing to it.

(1) [1918] 2 K. B. 100.
(2) 91 L. T. 310, 311.
(3) L. R. 6 Ex. 25, 30.

I think that the appeal should be allowed with costs here and below, and that the order in favour of the appellants should be restored.

LORD CARSON. My Lords, I agree with the conclusions arrived at by the noble and learned Lords who have already given their opinions. I do not think that the line of authorities relied upon by the majority in the Court of Appeal in Ireland has any application to the circumstances of this case.

I have had some difficulty on the materials before us in arriving at a decision that the damage caused by the breaches in the wall has been sufficiently proved to be connected with the default of the landlord to repair, but as your Lordships are satisfied upon this point I am not prepared to recommend that there should be a new trial of the action.

Order of the Court of Appeal in Ireland reversed, and Order of the King's Bench Division in Ireland restored: The respondent to pay the costs in the Court of Appeal in Ireland and the costs of the appeal to this House.

Lords' Journals, Feb. 20, 1922.

Solicitor for the appellants: *Herbert Z. Deane, for T. J. Liston, Tralee, and John O'Connell, Tralee.*

Solicitors for the respondent: *Young, Jones & Co., for M. J. Byrne, Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)*
1922
Feb. 27.

PALGRAVE, BROWN AND SON, LIMITED . . . . APPELLANTS;

AND

OWNERS OF S.S. TURID . . . . . RESPONDENTS

Shipping—Charterparty—Discharge of Cargo—Cargo to be taken from alongside at Charterers' Expense—Custom of Port—Inconsistency.

A vessel was chartered to carry a cargo of timber to Yarmouth under a charterparty which provided that the vessel should deliver the cargo at Yarmouth "always afloat . . . . cargo to be . . . . taken from alongside the steamer at charterers' risk and expense as customary." On her arrival at Yarmouth the vessel to lie "always afloat" could not come nearer than thirteen feet out from the quay. In these circumstances the custom of the port was that a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the shipbrokers on behalf of the shipowners should carry the cargo from the ship's rail over the staging and dump the same on the quay at not less than 10 feet from the quay edge, and that the whole cost of this work should be borne by the shipowners. This work was done and was paid for by the shipowners under protest. In an action by the shipowners against the charterers for the difference between the cost of the whole work and the rate for delivery at the ship's rail:—

Held, that the custom was inconsistent with the provision in the charterparty that the cargo should be taken from alongside the steamer at charterers' expense, and that the shipowners were entitled to succeed.

Holman v. *Wade* (The Times, May 11, 1877) applied.

Stephens v. *Wintringham* (1898) 3 Com. Cas. 169 overruled.

Decision of the Court of Appeal [1921] P. 146 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court (Duke P. and Hill J.) (2) which affirmed a decision of the judge of the county court of Norfolk holden at Great Yarmouth.

The facts are fully stated in the report before the Court of Appeal and in the judgment of the Lord Chancellor.

1922. Feb. 2, 3. *MacKinnon K.C.* (with him *Harney K.C.*) for the appellants. By clause 3 of the charterparty it is agreed that the steamer shall be discharged according to the custom of the port and that the cargo shall be taken from alongside the steamer at charterers' risk and expense as customary. The question is who is to pay so much of the cost of discharging the vessel on her arrival at Yarmouth as consisted in erecting a staging in accordance with the custom of that port and having the timber carried across it and deposited on the quay in accordance with the custom. The evidence tendered of the custom of the port is admissible in this case inasmuch as it does not contradict the charterparty. The word "alongside" does not mean "at the ship's rail" and is not a word of such precise meaning as to exclude evidence of the custom of a particular port explaining what according to the customary method of discharge at that port is its meaning. The Courts below were bound by the decision of the Court of Appeal in *Holman* v. *Wade* (1), which is only reported in The Times newspaper, but Hill J. and Scrutton L.J. would have decided the point in the appellants' favour but for that decision. It is submitted that *Holman* v. *Wade* (1) was wrongly decided and ought to be overruled. The test in determining whether evidence of the custom of a particular port is admissible is, as is laid down by Lord Campbell in *Humfrey* v. *Dale* (2), whether the custom is explanatory of or is contradictory to the tenor of the written contract. Here the addition of the provisions of the custom to the charterparty explains the meaning of the written terms, but is not inconsistent with them. *Aktieselkab Helios* v. *Ekman & Co.* (3), which was a decision on a custom of the port of London, supports the appellants' argument, and in that case the words "as customary" did not appear in the charterparty. In *Glasgow Navigation Co.* v. *Howard* (4) the question was as to the limits of the custom and the point of inconsistency was not there raised. The strongest case in the appellants' favour is *Stephens* v. *Wintringham* (5), where a custom that timber should be taken from the ship's hold and carried across the quay to a distance of about 60 feet from the side of the vessel by stevedores employed by the shipowner was held to be not inconsistent with a provision in the charterparty that the cargo should "be taken from alongside at merchants' risk and expense according to the custom of the port." *The Nifa* (1) is distinguishable because the words "as customary" were, in the context in which they were found, construed as referring only to the time and mode of delivery. The decision was not that the custom was inconsistent with the terms of the charterparty, but that there was no reference to the custom in the relevant clause. [He also referred to *Brenda Steamship Co.* v. *Green* (2) and *Northmoor Steamship Co.* v. *Harland & Wolff.* (3)]

---

* *Present:* VISCOUNT BIRKENHEAD L.C., LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD BUCKMASTER.

(1) [1921] P. 146.

(2) [1920] P. 370.

---

(1) The Times, May 11, 1877.
(2) (1857) 7 E. & B. 266, 274.
(3) [1897] 2 Q. B. 83.
(4) (1910) 15 Com. Cas. 88.
(5) (1898) 3 Com. Cas. 169.

Raeburn K.C. and *J. C. Trapnell* for the respondents were not called on.

The House took time for consideration.

1922. Feb. 27. VISCOUNT BIRKENHEAD L.C. My Lords, the amount in dispute in this case is very small—46*l.* 17*s.*; but the main, if not indeed the only, point for decision is of some importance and requires careful consideration. It may be shortly stated. Whether the proved custom of the port of Great Yarmouth touching the discharge and delivery there of a cargo of timber, such as that in fact carried by the steamer *Turid*, is inconsistent with the contract in writing binding on the parties to this appeal, and dealing with the same matter, or is only explanatory of the terms of this contract.

The facts are few and simple. By a charterparty dated October 1, 1914, it was agreed that the owners of the steamer *Turid* should load on that ship at Soroka a cargo of deals, battens, boards and short ends, and thence carry the same for the defendants (the appellants in this appeal) to Great Yarmouth as ordered, or so near thereunto as she might safely get, and deliver the said cargo to the defendants always afloat on being paid the freight therein mentioned in full of all port charges and pilotage.

---

(1) [1892] P. 411.
(2) [1900] 1 Q. B. 518.
(3) [1903] 2 I. R. 657.

Clause 3 of the charterparty runs as follows: "The cargo to be loaded and discharged with customary steamship despatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at Twenty-five pounds per day, and pro rata for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary."

The *Turid* arrived at Great Yarmouth on Sunday, November 8, 1914, and was berthed about 12 feet from the appellants' quay, but her draught was such that while afloat she could not be brought into a position in which her bulwarks would be nearer than 13 feet out from this quay. To discharge her cargo a staging was necessary between the ship's side and the quay abreast of her several holds in order to bridge over the separating space. This staging was constructed by baulks of timber carried from the quay to the ship's side at a level of 4 or 5 feet below the bulwarks, with planks resting upon these baulks. The cargo was discharged in this way under directions given by the stevedores.

Messrs. Palgrave, Brown & Son, Ld., the appellants in this appeal, refused to pay the extra cost of erecting the staging, amounting to 46*l.* 17*s.*; whereupon the owners of the *Turid*, the present respondents, instituted a suit in the county court of Norfolk holden at Great Yarmouth to recover this sum as damages for breach of the charterparty, or alternatively as money paid at the defendants' request. In the statement of claim it was averred that the *Turid* was always ready and willing to deliver her cargo alongside in accordance with the charterparty; that the defendants (the present appellants) refused to accept delivery alongside as so provided, but compelled the owners of the ship to place the cargo on the appellants' quay to which access could only be obtained by carrying the cargo over a wooden staging, which it became necessary to erect, and which they did erect accordingly, between the steamer and the quay in order to take delivery; that the plaintiffs (the respondents) under protest carried the cargo from alongside their vessel over this staging and stacked the same on the appellants' quay as directed by the latter.

The real defence pleaded in answer to this claim was that by clause 3 of the charterparty it was agreed that the *Turid* should be discharged according to the custom of the port, and that the cargo should be taken from alongside the steamer at charterers' risk and expense as customary; that it was the custom of the port of Great Yarmouth that a wooden staging should be erected between the ship about to discharge and the quay, and that stevedores employed by the shipbrokers as agents for and on behalf of the shipowners should carry the cargo from the ship's rail over the said wooden staging and dump the same at a place not less than 10 feet from the quay edge; that the cost of thus discharging the cargo and erecting this staging should be borne by the shipowners; and that the cargo of the *Turid* was discharged according to this custom.

To this defence a reply was filed which, after denying that the custom relied on existed, and also denying that the cargo of the *Turid* was discharged in accordance with it, alleged that the custom was inconsistent with the express terms of the contract between the parties, which required the appellants to take the cargo from alongside the steamer at their own risk and expense, and that it was not admissible to vary them. The case was tried before Judge Mulligan, the learned county court judge. Evidence was tendered to prove the custom relied on. It was objected to by counsel appearing for the owners of the ship, but admitted subject to objection. Several authorities were cited to the learned judge, including *Holman* v. *Wade*. (1) He held that the custom as pleaded flatly contradicted the express terms of the charterparty—namely: (i.) that "the cargo was to be brought to and taken from alongside the steamer at the charterers' risk and expense as customary"; (ii.) that the words "as customary" related to the means of doing the work and not to the expense of doing it, the incidence of the expense having been fixed by the preceding words; and (iii.) that the evidence of the custom was therefore not admissible. The learned judge therefore gave judgment for the owners of the steamer. On December 23, 1919, the defendants gave notice of appeal to the Divisional Admiralty Court.

---

(1) The Times, May 11, 1877.

The appeal was heard by the President and Hill J. They differed in opinion; the former learned judge, after an elaborate review of the relevant authorities, was of opinion that the custom pleaded was inconsistent with the charterparty, and the latter was of opinion that it was not so, and said that if he had not felt himself bound by the case of *Holman* v. *Wade* (1), he would have decided in favour of the defendants. The appeal was consequently dismissed.

The appellant company then appealed from the Divisional Court to the Court of Appeal. The case was heard on January 17, 1921, by a Court composed of the Master of the Rolls and Warrington and Scrutton L.JJ. The Master of the Rolls, in delivering judgment, said (2): "In my opinion this case is governed by the decision in *Holman* v. *Wade* (1), and that being so, I do not think it necessary, or indeed advisable, to express any opinion of my own as to what my decision might have been if I had not thought the case to be governed by *Holman* v. *Wade*. (1)" He points out that the two learned judges in the Divisional Court differed in the manner already stated, and then adds: "There is a great deal to be said on both sides, and I do not think it necessary or right to express any opinion upon it." He then utters a regret, which every one must feel who has to deal with the case of *Holman* v. *Wade* (1), that it is not well and fully reported. He points out that no opinion was ever delivered about it by the Court of Appeal in England, but that it has been

---

(1) The Times, May 11, 1877.

(2) [1921] P. 146, 149, 150.

H. L. (E.)
1922
PALGRAVE, BROWN & SON, LD.
v.
S.S. TURID.
Viscount Birkenhead L.C.

often cited in Courts of first instance and, as far as he was aware, no disapproval of it had ever been expressed. He then states the facts of the case as disclosed in the pleading, and points out that the custom relied upon in the defence was stated in that case in the following words: "'It is the customary and recognised mode of discharge of the Victoria Docks at Hull for ships laden with timber to discharge their cargo upon the quay alongside, and to continue the discharge as long as there is quay space vacant for the discharge thereof, and the cargo is then taken from alongside by the consignees thereof,'" which, though strangely expressed, he thought meant that when the cargoes had been discharged upon the quay, but not till then, had the vessel been discharged "alongside," and that the consignees taking it thence were taking it from "alongside." He says it would appear as though the custom put to the jury was not exactly in the terms pleaded, because from the Associate's certificate it appeared that "the jury found that according to the terms of the charterparty (apart from the question of usage or custom) the cargo was not to be taken by the shipowner from the ship's rail by means of a stage, supplied by him, to the quay, and there stacked by and at the risk and expense of the shipowner; that was to be done by and at the risk and expense of the merchants." The jury also found "that the alleged usage or custom is proved to their satisfaction." Upon these findings Manisty J., he says, entered judgment for the plaintiff on the ground that the custom was inconsistent with the charterparty, and his decision was affirmed by the Court of Appeal. The learned Master of the Rolls concludes his judgment by saying that in his opinion the case before them could not be distinguished from the decision in the case of *Holman* v. *Wade* (1), and that therefore the appeal failed and should be dismissed with costs. The Court of Appeal which affirmed Manisty J.'s decision was composed of Lord Coleridge, Bramwell and Brett L.JJ. The judgment was delivered by Bramwell L.J., who stated that both Lord Coleridge and Brett L.J. concurred with him.

---

(1) The Times, May 11, 1877.

Warrington L.J., in delivering judgment, said (1): "I am of the same opinion. I also think that we are bound by the decision in *Holman* v. *Wade.* (2) It is quite true that the report of *Holman* v. *Wade* (2) is somewhat unsatisfactory, and the rest of the materials for considering that case are afforded only by the record. But this, at all events, is clear both from the report and from the record, that the question between the parties was, who was to pay the expense of the process by which, according to the alleged custom, the cargo was discharged. The shipowner said: 'By the terms of the contract you, the charterers, are to pay the expense of discharging from alongside.' The charterers said: 'By the custom which we have proved you, the shipowners, are not only to perform the operation of carrying the cargo in the way we say the custom prescribes, but you must pay the expense of it.' The ultimate decision was that at any rate that part of the custom which was said to throw the expense upon the shipowner was inconsistent with the terms of the contract, which provided that the cargo should be taken from alongside the ship at the risk and expense of the charterer." On the whole, for the reasons given by the Master of the Rolls, he was of opinion that they were bound by *Holman* v. *Wade*, and held that the appeal should be dismissed. Scrutton L.J. found great difficulty in holding himself bound by a decision in a case about which they knew so little as they did about *Holman* v. *Wade* (2), but ultimately came to the conclusion—not without considerable doubt—that they were bound by it, and held that the appeal should be dismissed.

The words of the charterparty in this case are: "Taken from alongside the steamer at charterers' risk and expense." I am myself of opinion that the word "alongside," if it does not suggest actual contact, does at all events suggest close contiguity, and not the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation. It will be observed that the custom proved in this case does not refer at all to the extent of the distance which may separate the ship from the quay. A vessel with a greater draught than the *Turid* might, in order to keep always afloat, have to be berthed at over 8 yards distant from the quay instead of, as in this case, about 4 yards distant from it. There was no evidence given upon this point. All that was proved is that the *Turid* could not get nearer to the quay, if she was to keep always afloat as the charterparty provided. The custom relied upon was proved by two witnesses examined on behalf of the appellants. Their evidence as given in the notes of the learned county court judge was as follows: "William Summers Wharton, manager of defendant company, was then sworn and said: It was the custom to erect a wooden stage between the ship and the quay and for stevedores to be employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the wooden staging, and to put it down 10 or 12 feet from the edge of the quay. This was all done at the cost and expense of the shipowners. That had been the practice for the 33 years he had been in the trade. . . . . William Brown, shipbroker, with 30 years' experience of Yarmouth, and Richard Jewson, President of the Timber Trade Federation, with 36 years' experience in the timber trade at Yarmouth, gave evidence to the same effect as Wharton. They were not cross-examined."

---

(1) [1921] P. 152.

(2) The Times, May 11, 1877.

Hill J., in giving judgment, said when dealing with this evidence (1): "The method of discharge was that a staging was slung from the ship's side to the quay abreast of each of the three holds, and the stevedore's men, working in two gangs, carried the timber from the ship's deck and holds across the staging and on to the quay, and stacked it on the quay, leaving a space of 10 to 12 feet between the edge of the quay and the outer edge of the stacks; one gang broke out the timber and carried it to the ship's rail; the other received it on the staging and carried it to the place of stacking on the quay and there stacked it. . . . . The contention of the charterers was that, by the custom of the port of Yarmouth, the whole of this work was done by and at the expense of the shipowner. The contention of the shipowners was that the custom was inconsistent with the express terms of the charterparty, and that their obligation was to deliver at the ship's side—i.e., that the work of the first gang was ship's work, but the work of the second gang, including the erection of the stagings, was charterers' work. The amount in dispute was the difference between the cost of the whole of the work and the rate for delivery at the ship's rail."

---

(1) [1920] P. 370, 381.

In *Humfrey* v. *Dale* (1) Lord Campbell C.J. states the rule of law as to the admission of evidence of a custom to contradict or qualify the tenor of the terms of a written contract. He says: "Neither collateral evidence nor the evidence of a usage of trade is receivable to prove anything which contradicts the tenor of a written contract," and on the next page he says: "Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument." Of these words, "or adding a tacitly implied incident to the contract," more presently.

On the following page he apparently suggests a test by which the repugnancy or non-repugnancy of "the something" sought to be introduced may be determined. He says: "To fall within the exception, therefore, of repugnancy, the incident must be such as if expressed in the written contract would make it insensible or inconsistent." I shall endeavour presently to apply this test, for I accept and agree with it.

This case of *Humfrey* v. *Dale* went to the Exchequer Chamber (2), and was argued before seven learned judges, of whom four, Cockburn C.J., Pollock C.B., Williams and Crowder JJ., affirmed the judgment of the Queen's Bench that the evidence of custom tendered was admissible, and three, Willes J., Martin and Channell BB., were of a contrary opinion. None of these learned judges, however, seemed to disapprove of Lord Campbell's statement of the principle or of the test suggested by him to determine the question of repugnancy. They differed as to the result of the application of those principles to the facts of the particular case, which was not a case touching ships or charterparties. In *Southwell* v. *Bowditch* (1) Jessel M.R., whose judgment is much more fully reported in 45 L. J. (Q. B.) 630, said that the difference of opinion in *Humfrey* v. *Dale* depended on this—the Statute of Frauds required a contract in writing, and of course the usage could not be contradictory to the contract or it would not be binding. It must be explanatory of the contract, and the point upon which the judges differed was whether the usage was explanatory or contradictory. They all agreed that if explanatory it might be admitted; if contradictory it could not be admitted. He then proceeds: "The real point, as I said before, was whether in that particular instance the usage was contradictory or explanatory. I know some of the Judges attempted to get over the difficulty by saying it was additional, but addition, if pure addition, is not explanation. It is a new contract, and therefore a pure addition would require to be in writing; but again, there could have been no difficulty in saying this, that though, in an action upon the written contract, the mercantile usage might not be admissible for the purposes of contradicting the contract, because it would be additional, the contract implied by usage might still be available for the purpose of charging the defendant."

---

(1) 7 E. & B. 266, 273, 274, 275.

(2) (1858) E. B. & E. 1004.

Let me now apply the test suggested by Lord Campbell, and write in after the words "as customary" in the charterparty words describing the custom relied upon in the case. The clause in the charterparty will then run somewhat thus: "*The cargo to be taken from alongside the steamer at charterers' risk and expense as customary; that is to say, shall at the shipowners' risk and expense* be carried from the rail of the vessel over a wooden staging bridging the distance between the ship rail and the quay, constructed at the risk and expense of the shipowners, and dumped at a place on the quay not less than three yards from its edge." These added words seem to me to be absolutely inconsistent with the tenor of the language of the charterparty. Whatever may be the locality indicated by the words "alongside the steamer always afloat," it can hardly be a spot on dry land in this instance about 8 yards away from the ship's rail and about 3½ yards from the water on which she floats. The operation of taking the cargo from "alongside the steamer" is, according to the charterparty, to be conducted at the risk and expense of the charterer; but according to the custom nothing is to be done at the risk and expense of the charterer unless it be the taking away of the timber from the place at which it is dumped upon the quay. Therefore, the taking of it from that dump must be the removal of it from "alongside the steamer" within the meaning of the custom. The risk and expense of bringing it there is to be borne by the shipowner just as in the ordinary case would be the risk and expense of bringing it to the ship's rail. To satisfy the condition in the charterparty as to this risk and expense one must, in order to reconcile it with the custom proved, hold that the dump on the quay about 8 yards away from the rail of the ship is the "alongside the steamer," and that the taking of the cargo away from that dump is the taking of it "from alongside the steamer" within the meaning of the charterparty. I cannot reach such a conclusion.

---

(1) (1876) 1 C. P. D. 374; 45 L. J. (Q. B.) 630, 632.

With one exception—namely, the case of *Stephens* v. *Wintringham* (1)—the cases cited on behalf of the appellants on the hearing of this appeal support the respondents' case rather than that of the appellants. The other cases cited are easily distinguishable from the present. The first of the former class is that of *The Nifa.* (2) The second is that of *Hayton* v. *Irwin.* (3) In the case of the *Nifa* the charterparty provided that her cargo, composed of deals, should be "brought to and taken from alongside of the ship at the merchants' risk and expense, where she can lie always afloat . . . .," and, further, that being so loaded therewith she should proceed to Yarmouth, Norfolk, or so near thereto as she could safely get and deliver the same always afloat. The following additional clause was then written in: "The cargo to be supplied as fast as steamer can load and stow same." On arrival at Great Yarmouth the ship was moored 15 feet from the edge of the quay, which was as near to it as she could lie always afloat, and in consequence of this 9*d.* per standard extra cost was incurred in the discharge of the cargo. In an action brought by the shipowner to recover this extra cost the county court judge admitted evidence of a custom that the shipowner must deliver on the quay, and, therefore, should bear the extra cost of bringing the timber from the ship's rail to the quay. The shipowner appealed to the Admiralty Division. The appeal was heard by Sir Francis Jeune, the then President, and A. L. Smith J., as he then was. They held (1) on the authority of *Holman* v. *Wade* (2) and *Hayton* v. *Irwin* (3), that evidence of the custom was not admissible, as it was inconsistent with the written contract. In the latter case by the terms of the charterparty the vessel was to deliver the cargo at Hamburg or as near thereto as she could safely get, to discharge as customary, the cargo to be brought to and taken from alongside the ship at the merchants' risk and expense. The draught of the vessel with the cargo on board would not allow her to proceed to Hamburg. The point nearest to Hamburg which she could reach was a place named Stade. The merchants refused to take delivery of any part of the cargo there. In order to lighten the vessel, part of the cargo was discharged into lighters at this place and sent in them to Hamburg. The shipowners sued the charterers to recover the lighterage expenses, and the case was heard on appeal by Bramwell, Brett and Cotton L.JJ., who held (confirming the decision of Grove J.) that the defence alleging that by the custom of the port of Hamburg the defendant was not bound to take delivery elsewhere than at Hamburg was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract.

---

(1) 3 Com. Cas. 169.
(2) [1892] P. 411.
(3) (1879) 5 C. P. D. 130.

(1) [1892] P. 411, 416, 419.
(2) The Times, May 11, 1877.
(3) (1879) 5 C. P. D. 130.

The first of the cases which are distinguishable from the present case is *Aktieselkab Helios* v. *Ekman & Co.* (1) There, as here, the words of the charterparty were "*brought to and taken from alongside the ship at merchants' risk and expense.*" Barges were sent by the consignee alongside the ship to take the cargo, and the point in controversy was whether, by the custom of the Port of London, the shipowner was bound, not only to deliver the cargo into these barges, but to stow it on them. The consignees asserted that by the custom of the Port of London in the case of ships discharging timber at that port an obligation lay upon the shipowner to stow the long lengths of timber, of which the cargo in question was partly composed, in lighters brought alongside the ship by the consignees for the purpose of receiving the cargo. The learned judge who tried the case (Collins J., as he then was) found that upon the evidence there was a custom of the Port of London by which, in the case of a ship discharging long lengths of timber, the shipowner was bound to put the timber into lighters in such a way and to such an extent that the lighters might fairly be deemed to be loaded, but he found it unnecessary for the purposes of the case to decide whether the obligation imposed by the custom embraced stowing the timber in the barges in the sense of so arranging it that the barge might be conveniently navigated and should be loaded to her full capacity, and held that the custom so found by him to exist was not inconsistent with the charterparty. The Court of Appeal, composed of Lord Esher M.R., A. L. Smith and Chitty L.JJ., held that the custom was not inconsistent with the provisions of the charterparty. Chitty L.J. put the reason for the decision neatly in these words (2): "The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed, it is the duty of the merchants, in accordance with the charterparty, to take from alongside the cargo thus delivered."

---

(1) [1897] 2 Q. B. 83.

(2) Ibid. 92.

The second of these distinguishable cases is the case of the *Glasgow Navigation Co.* v. *Howard.* (1) In it the charter-party provided that the cargo was "to be brought to and taken from alongside the steamer . . . . at charterers' risk and expense," and provided further that "if discharged in London the cargo shall be discharged as customary with customary steamer despatch, in accordance with the custom of the port, as fast as the steamer can deliver during ordinary working hours of the port, Sundays and holidays (unless used) excepted." The bill of lading contained the following clause: "If discharged in London cargo shall be discharged according as customary with customary steamer despatch." The question in dispute between the parties was the extent to which the custom of the Port of London affected the mode in which the timber constituting the cargo should be stowed and arranged in the craft which the merchant sends alongside. It was held by Hamilton J. (as he then was), that by the custom and practice of the Port of London in the case of cargoes of timber, the receiver is only liable to provide sufficient of these open craft to receive the goods alongside from the ship, and is under no obligation to have men in the open craft to receive the goods from the ship's tackle or to stow them. That the shipowner is bound to do the whole work of delivering the goods into the craft and of stowing them therein in a reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the craft may be loaded in the usual and reasonable manner and extent so as to be profitably and safely navigable. It is apparent, therefore, that the matter in controversy in the case was not that now under debate before your Lordships, but to a large extent, as the learned judge said, the controversy was what was included in the word "discharging" used in the documents.

The decision on the case of *Northmoor Steamship Co.* v. *Harland & Wolff* (2) is not directly in point; but the judgment of Palles C.B. is well worth perusal, especially in view of his criticism of the judgment delivered by

---

(1) 15 Com. Cas. 88.

(2) [1903] 2 I. R. 657.

Bigham J. (as he then was) in the case already mentioned of *Stephens* v. *Wintringham.* (1) In that case the charterparty provided, as does the charterparty in the present case, that the cargo should be taken from "alongside" the ship at the merchant's risk and expense according to the custom of the port. The custom of the port was that after the cargo was raised from the hold by means of winches and slings it was taken by stevedores employed and paid by the shipowner, and carried to the only place upon the quay fit to receive it, which was about 60 or 70 feet from the vessel's side, and there dumped in piles. The merchant did not interfere in any way with these stevedores. The learned judge held that this mode of discharge amounted to taking the cargo from alongside and not more than alongside. The learned Chief Baron said (2): "I think the ground of that decision was that, according to the custom of the port, the shipowner was bound to discharge on the quay, and that the only part of the quay upon which he could discharge was a place which was 60 or 70 feet away from the ship's side, so that he did no more than perform his obligation, although the mode of performance was rendered more expensive and onerous to him by the acts of those over whom neither he nor the merchant had control. This is the only view of the case which is consistent with *Holman* v. *Wade* (3) and *The Nifa.* (4)" This observation suggests, I think, that the learned Chief Baron approved of the decision in these two latter cases. I concur in his criticism of *Stephens* v. *Wintringham.* (1) As to the case of *Holman* v. *Wade* (3) I may for myself say that on the additional facts which, by the helpful industry of the Master of the Rolls, we are now in a position to consider, the case was rightly decided. For these reasons I think this appeal must be dismissed with costs and I so move.

My Lords, my noble and learned friend Lord Parmoor concurs in the opinion I have just expressed.

(1) 3 Com. Cas. 169.

(2) [1903] 2 I. R. 665.

(3) The Times, May 11, 1877.

(4) [1892] P. 411.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, all the Courts below have felt themselves bound to follow and apply the decision of the Court of Appeal in *Holman* v. *Wade* (1), which your Lordships are free to overrule. The first question is, how far it would be expedient to do so, for nobody suggests that it can be distinguished. It is a decision on words which have long been common in timber charters, and it regulates the relation of such charters to established customs in a number of places of great importance. It was indeed only reported in The Times newspaper, but, so far from being lost sight of by those interested in timber charters and timber cargoes, it has all along been set out in one at least of the classic treatises on the subject: Carver's Carriage by Sea; it has been cited in argument over and over again, in the cases of *The Nifa* (2), *The Helios* (3), and *The Fulford* (*Stephens* v. *Wintringham* (4)) to name no others, and in particular was relied on as an authority, which they applied in their judgments, by both Sir Francis Jeune and A. L. Smith J. in *The Nifa*. (2) The Master of the Rolls, in the Court below, says (5) that *Holman* v. *Wade* (1) "is only reported in a most unsatisfactory manner, that is to say, it is only reported as a piece of news in the newspaper. . . . The difficulty about it is to ascertain exactly what it decided." As for this, if it had not been reported at all, it would still have been a decision, which, when brought to light by any means, must have been regarded as authority. I have often wondered what would happen, if some learned and industrious person compiled from the records and cases lodged by the parties in your Lordships' House, and the transcripts of your Lordships' opinions preserved in the Parliament Office, a selection of "Unnoticed House of Lords Cases." The results might be somewhat unexpected, but the decisions themselves all Courts, your Lordships' House included, would be bound to follow, wherever they applied.

---

(1) The Times, May 11, 1877.
(2) [1892] P. 411.
(3) [1897] 2 Q. B. 83.
(4) 3 Com. Cas. 169.
(5) [1921] P. 149.

As for the actual report in *Holman* v. *Wade* (1), it turns out, on reference to the original pleadings, to be very correct, and I think it is plain what was decided. It is true the report is very brief, and I wish this model were more often followed. We who deliver judgments would alone regret it.

My Lords, I should not, under these circumstances, have thought it necessary to inquire whether this decision, now forty-four years old and never doubted, was or was not right, had it not been that Hill J. and Scrutton L.J., whose opinions command the greatest attention, would have been inclined, if free, to decide the other way. *Holman* v. *Wade* (1) is in line with all other cases on this kind of point, except *Stephens* v. *Wintringham* (2), which cannot, in my opinion, be distinguished, unless on the ground that "taken from alongside" gave a greater latitude in determining where "alongside" was than the words "from alongside the ship" would have done. This is not the ground taken in the judgment. The learned judge seems to have merely dealt with the case as a question of fact, and, if so, it is not of general importance. He apparently put to himself the question: "If the captain, whose ship is at the quay, delivers the cargo in, at any rate, the customary method, when does he get it to a place that can be called 'alongside' the ship, so as to complete the performance of his duty?" His answer on the facts was "when he has got seventy feet away." As this involved the ship in extra and special expenses, I think it was not in accordance with the charter.

In *The Nifa* (3) on the other hand the Divisional Court held that this very custom of Great Yarmouth was inconsistent with the express words of the charter, because, in imposing on the ship the cost of doing something after the cargo was clear of the ship (which in the case of long lengths of timber is what I suppose A. L. Smith J. meant by "putting the goods on the ship's rail"), it contradicted the charter, which said that whatever was done thereafter the merchant paid for it. On the other hand in *Aktieselkab Helios* v.

---

(1) The Times, May 11, 1877.

(2) 3 Com. Cas. 169.

(3) [1892] P. 411.

Ekman & Co. (1), to which A. L. Smith J. was a party, *The Nifa* (2) and *Holman* v. *Wade* (3) were cited but not commented on, the case being regarded, and rightly, as being quite different from them. The question was not "how far off from the ship can a spot be said to be alongside the ship," but "is it inconsistent with such a charter to require the ship, when lowering a long length of timber out of the ship into a lighter alongside, to get the piece of timber fore and aft of the barge before releasing it," and as this was a question of the mode of handling the goods, when delivering in the agreed place, it fell within the custom to which the charter referred. The decision in *Northmoor Steamship Co.* v. *Harland & Wolff* (4) follows the same reasoning as that adopted in *The Nifa.*

The views of Hill J., in the present case, that the place in question was "reasonably along the side of the ship," and so was within the express contract, and of Scrutton L.J., who, agreeing with Hill J., further says that the custom simply explains what the delivery of the cargo alongside is, are based on an examination of the locality denoted by "alongside." Presumably they thought that, if the place of delivery was alongside, though twenty-three feet away, no question of expense arose. Conversely, in *The Nifa* (2) and the *Northmoor Steamship Co.'s Case* (4), I presume the Court would have said that the spot, of which they spoke, was not alongside, and therefore the prescriptions of the charter as to expense were paramount. I do not think the two considerations of place and expense can be so completely severed. Doubtless the words "alongside the steamer" may be satisfied, though the apparatus of reception, be it barge or cart or what not, may not be in actual contact with the ship's side. It may well be that the ship can be required to deliver to the full reach of her tackles; but here not distance only, but cost also conditions the customary mode of delivery, and the question of being alongside depends not only on the distance to be traversed to reach the customary place

---

(1) [1897] 2 Q. B. 83.

(2) [1892] P. 411.

(3) The Times, May 11, 1877.

(4) [1903] 2 I. R. 657.

H. L. (E.)
1922
PALGRAVE, BROWN & SON, LD. v. S.S. TURID.
Lord Sumner.

of alongside delivery, but also on the trouble, which is, of course, commercially convertible into the expense, of getting there. Here an extemporised pier had to be built out at the ship's expense, although no one says she could have got any nearer to the quay, or was not an arrived ship. The quay was the defendants' quay, and there was not enough water at it for the ship to lie alongside of it, always afloat. The quay was one, which, from circumstances affecting the receivers only, had to be clear of timber piles to a depth of 10 feet from its edge, and along or behind that 10-foot line the custom required the ship to deliver the timber. Though the ship was in a position in which she was entitled to require the process of delivery to begin, the merchants say that they were duly taking the cargo from alongside the steamer, though they could not reach the steamer from their selected spot, nor could the ship's stevedores reach it from the steamer without the interposition of a temporary structure and of a new form of transport by man-handling the timber. I am unable to reconcile this with being alongside the steamer, the steamer being where she was entitled to be at the commencement of the process of delivery. The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13 feet of water, bridged by a staging, and at least 10 feet of quay, traversed by porters, I think the spot is too far away. Accordingly, in my opinion, the appeal fails.

LORD BUCKMASTER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 27, 1922.

Solicitors for the appellants: *Trinder, Capron, Kekewich & Co.*

Solicitors for the respondents: *Botterell & Roche.*

[HOUSE OF LORDS.]

GREENWOOD . . . . APPELLANT;

AND

F. L. SMIDTH AND COMPANY . . . RESPONDENTS.

H. L. (E.)*
1922
Feb. 27.

Revenue—Income Tax—Trade exercised within United Kingdom—Assessment of non-resident Persons in Name of Branch—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *Sch. D—Finance* (*No.* 2) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 31.

By s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, "A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under s. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager":—

Held, that the sub-section was not a charging sub-section, but that it merely summed up the effect of s. 41 of the Act of 1842 as extended by sub-s. 1 of s. 31 of the Act of 1915, still keeping within the limits of Sch. D, and consequently did not bring into taxation profits made by non-residents from a trade not exercised within the United Kingdom.

The respondents were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an office in London in charge of a qualified engineer who was their whole-time servant. He received inquiries for machinery such as the respondents could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the respondents and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. The respondents were assessed to income tax in respect of the profits derived from dealings in machinery with purchasers in the United Kingdom:—

Held, that they did not exercise a trade within the United Kingdom within the meaning of Sch. D of s. 2 of the Income Tax Act, 1853, and were not assessable to income tax either under that Schedule or under s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915.

Decision of the Court of Appeal [1921] 3 K. B. 583 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Margaret and St. John in the county of Middlesex.

---

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

(1) [1921] 3 K. B. 583. (2) [1920] 3 K. B. 275.

The substantial questions raised by the appeal were, first, whether profits arising to the respondents, who were a firm resident in Copenhagen, were chargeable to income tax under Sch. D of the Income Tax Act, 1853, as profits arising from the exercise of a trade within the United Kingdom, and secondly, whether those profits were chargeable to income tax under sub-s. 2 of s. 31 of the Finance (No. 2) Act, 1915 (1), as profits arising directly or indirectly to a non-resident person through or from a branch, factorship, agency, or management.

The facts, which are fully set out in the report of the case before Rowlatt J., may be thus summarised.

The respondents were a firm consisting of two partners, both of whom were Danish subjects who resided and carried on business in Copenhagen. The business of the firm was that of manufacturers of, and dealers in, machinery for cement works, brick works, mortar works and mining industries, and the firm supplied such machinery to all parts of the world including the United Kingdom. Neither of the partners had any residence in the United Kingdom. The firm maintained an office at 9 Bridge Street, Westminster, which they rented as sub-tenants, and the name of the firm was on the office door and in the Post Office Directory. At this office the firm employed Mr. S. G.

---

(1) Finance (No. 2) Act, 1915, s. 31: "(1) Section forty-one of the Income Tax Act, 1842 (which relates to the charge of income tax in special cases), shall, so far as it relates to the taxation of non-residents, be extended—

(*a*) so as to make non-resident persons chargeable to income tax in the name of any branch or manager as well as in the name of any factor, agent, or receiver; and

(*b*) so as to make non-resident persons so chargeable, although the branch, factor, agent, receiver, or manager may not have the receipt of the profits or gains of the non-resident.

(2) A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section forty-one of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager."

H. L. (E.)
1922
GREENWOOD
v.
F. L.
SMIDTH
& CO.

Robinson as consulting engineer. Mr. Robinson's duties included the discussion of requirements with prospective purchasers, the inspection of sites of proposed installations of machinery, the taking of samples of earth, and the forwarding of such samples to Copenhagen for testing. He did not himself make contracts with the purchasers, but all contracts were concluded by negotiation direct with the firm in Copenhagen and the goods were shipped f.o.b. Copenhagen. He had the general oversight of the erection of all important installations of the respondents' machinery in the United Kingdom, and in some cases the respondents also sent a supervising engineer from Copenhagen for the same purpose. No price lists or catalogues were issued by the respondents in the United Kingdom or kept in the London office and no advertisements appeared in the trade papers in the United Kingdom.

Assessments to income tax under Sch. D were made upon the respondents in respect of the financial years 1913–14, 1914–15, 1915–16, 1916–17 and 1917–18, in the sum of 5000*l.* for each of the said years, the notices of assessment being addressed to "Messrs. F. L. Smidth & Co. of Palace Chambers, Bridge Street," and afterwards "of 20 Essex Street, Strand."

The respondents appealed to the General Commissioners. At the hearing of the appeal the respondents contended, first, that they did not exercise a trade in the United Kingdom and, secondly, that s. 31 of the Finance (No. 2) Act, 1915, was merely a machinery section, and that they were not liable thereunder unless they exercised a trade within the United Kingdom.

The surveyor of taxes (the appellant) contended that the respondents were liable to be assessed under Sch. D (in respect of the exercise of a trade within the United Kingdom), and also, so far as regards the years 1915–16, 1916–17 and 1917–18, under sub-s. 2 of s. 31 of the Finance (No. 2) Act, 1915, in the name of their branch.

The Commissioners "after fully considering the facts and arguments of the parties were of opinion that trade

H. L. (E.)
1922
GREENWOOD v. F. L. SMIDTH & Co.

was exercised by the appellants" (the present respondents) "within the United Kingdom and that the contentions of the Surveyor were right and dismissed the appeal." After the decision of the Commissioners the Crown abandoned their claim to income tax in respect of the years 1913–14 and 1914–15.

Rowlatt J. reversed the decision of the Commissioners. He was of opinion, first, that the respondents did not exercise a trade within the United Kingdom and, secondly, that sub-s. 2 of s. 31 of the Finance (No. 2) Act, 1915, did not bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom. The Court of Appeal (Lord Sterndale M.R., Atkin and Younger L.JJ.) affirmed this decision on both points.

1922. Feb. 24, 27. *Sir Gordon Hewart A.-G.* and *Reginald Hills* for the appellant.

1. On the facts what was done here amounted to the exercise of a trade within the United Kingdom according to the principles laid down by Jessel M.R. in *Erichsen* v. *Last.* (1) This was a foreign trade partly carried on in this country. This is a question of fact for the Commissioners and, the Commissioners having found that trade was exercised by the respondents in the United Kingdom, that finding cannot be disturbed, there being here ample evidence to support it.

[They also referred to *Grainger & Son* v. *Gough* (2); *Crookston Brothers* v. *Furtado* (3); *Macpherson & Co.* v. *Moore* (4); *Werle* v. *Colquhoun.* (5)]

2. The profits in question are chargeable to income tax as profits arising directly or indirectly from a branch under s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, whether there was here an exercise of trade within the United Kingdom or not. The first sentence of the sub-section plainly charges such profits to tax. The respondents' argument that this

---

(1) (1881) 8 Q. B. D. 414, 416, 418.

(2) [1895] 1 Q. B. 71; [1896] A. C. 325.

(3) (1910) 5 Tax Cas. 602; 48 S. L. R. 134.

(4) (1912) 6 Tax Cas. 107; 49 S. L. R. 979.

(5) (1888) 20 Q. B. D. 753.

is not a charging provision at all treats this sub-section as adding nothing to sub-s. 1, but it is contrary to true principles of construction to impute meaningless statutory provisions to the Legislature. The Master of the Rolls and Atkin L.J., in adopting the respondents' contention, have treated sub-s. 2 as if it were not a separate sub-section, but as if it were clause (*c*) in the enumeration in sub-s. 1. Sub-s. 2 is obviously something more than mere machinery and is wide enough to hit the respondents. Upon a consideration of the section as a whole it was clearly the design of the Legislature to fill up various loopholes by which profits earned in this country had been found to escape income tax, and the object of sub-s. 2 was to charge profits earned in this country by trading operations which might not in themselves amount to the exercise of a trade in the United Kingdom under the Income Tax Acts previously in force.

Sir William Finlay K.C. and *A. M. Bremner* for the respondents (called upon on the second point only). It still remains an essential condition of the liability of a non-resident person to be taxed that trade should be carried on in the United Kingdom, and the two principal tests of that question are whether the contract is made here and whether delivery is effected here. Where contracts have been made abroad and deliveries have been effected abroad it has never been held that trade was carried on here. It is said that all that is swept away by sub-s. 2 of s. 31 of the Act of 1815, but the only test given in that sub-section is whether profits have arisen directly or indirectly through an agent or branch in this country. All is left vague and uncertain. If it was intended to create a new charge that should have been done in clear terms. The object of s. 31 was to amend s. 41 of the Income Tax Act, 1842, and s. 41 was a machinery section enacted to facilitate the assessment and collection of the tax in certain cases. It is not necessary to construe sub-s. 2 as making such a fundamental alteration in the basis of taxation as the abolition of the condition of the exercise of trade within the United Kingdom. The charging provisions of the Income Tax Acts are to be found in the schedules and these schedules are reproduced in the Income Tax Act, 1918, but Sch. D remains as it was. By that Act certain general rules are appended to the schedules and the provisions of s. 31, sub-ss. 1 and 2, are embodied in rr. 5 and 6. The inference is that these sub-sections are intended to carry out the charge imposed by the schedule itself and relate only to profits and gains arising from any trade exercised in the United Kingdom. Further, it is conceded that Robinson is not an agent and it is clear that he is not a branch. He cannot do any single trading business of any kind. He is the respondents' technical adviser. Therefore nobody here comes within the words of the sub-section and the assessments are bad on that ground.

Reginald Hills in reply. If the words of the sub-section are sufficient to create a charge it is not necessary that they should be included in any schedule. It is said that this is altering the effect of the schedule without any reference to it, but Parliament has that power. As to the Act of 1918, r. 6 is quite independent and does create a new charge. The rules are not mere machinery, but are substantive charging provisions. It cannot be said that because the actual schedule is not itself amended therefore no addition can be made to it. Sect. 31, sub-s. 2, does not refer to Sch. D. What then is the draftsman to do? He must put the alteration effected by the sub-section in the General Rules. Many alterations are not confined to any one schedule. If the Crown's contention fails r. 6 means nothing whatever.

LORD BUCKMASTER. My Lords, the facts of this case are fully set out in the special case stated by the Commissioners for General Purposes of the Income Tax Acts upon hearing the dispute as to the assessment the subject of the present appeal.

Upon the facts so found I entertain no doubt that according to the decision of *Grainger & Son* v. *Gough* (1) there was no material before the Commissioners to support their finding that the respondents exercised a trade within the United Kingdom. I do not think it is necessary for the purpose of supporting this view to repeat the reasoning expressed in the judgment of the Master of the Rolls. I desire to adopt all that he said, for with it I agree.

---

(1) [1896] A. C. 325.

There remains, however, a further point, which arises upon the construction of s. 31, sub-s. 2, of the Finance (No. 2) Act of 1915. The appellant argued that the effect of that sub-section is to extend the operation of Sch. D of the Act of 1853 and to render the respondents liable to be assessed for income tax, even though upon the facts they did not exercise trade within the United Kingdom. I am unable to accept the argument that the sub-section has that effect. It is, I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer. Sub-s. 2 here is at the best a sub-section of an extremely doubtful character, and I think there is very great weight in the argument that has been placed before your Lordships by Sir William Finlay and Mr. Bremner that, as the original charging power of the earlier statutes was derived from their schedules, if it were desired to affect and alter the operation of those schedules some clearer and better reference should have been made to their terms than the obscure and indirect reference that must be found in the section under consideration. Upon this point also I find myself in agreement with the views that have been expressed both by the Master of the Rolls and by Atkin L.J., and I do not think any advantage can be gained from repeating in other words the arguments which I think are sufficient to overthrow this appeal. It is therefore unnecessary to consider whether the consolidating Act of 1918 might be brought into consideration for the purpose of determining what the real meaning of the earlier section was. I pass no opinion upon that point, and it is important to observe that both the Master of the Rolls and Atkin L.J. only refer to its operation not by way of supporting the principal argument upon which their judgment depends, but by way of confirmation of a conclusion which has been independently reached.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

LORD WRENBURY. My Lords, I agree. I wish only to add that I particularly asked the counsel for the Crown to point, if they could, to any provision elsewhere in ss. 20 to 37 of the Act of 1915 (being that part of the statute which refers to income tax) which is a charging section. They were not able to do so. I have looked through the sections. There are sections imposing new rates of charge on persons already charged, but I find none that creates a new charge. Under those circumstances I am quite unable to adopt the view that sub-s. 2 of s. 31 has that effect. I fail to find any plain and unmistakable language to impose a charge. On the contrary, I can give full effect to sub-s. 2 by saying that it is intended to give effect to the extension which sub-s. 1 says " shall be " made.

LORD CARSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 27, 1922.

Solicitor for the appellant : *The Solicitor of Inland Revenue.*
Solicitors for the respondents : *Wainwright, Pollock & Co.*

[HOUSE OF LORDS.]

BOYCE . . . . APPELLANT;

AND

WASBROUGH AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)*

1922

March 7.

Settlement—Construction—Second Marriage of Wife—Wife's Fund—Ultimate Trust for Wife's statutory Next of Kin had she died intestate and "without having been married"—Claim of Child of former Marriage.

A wife, who had obtained a divorce from her first husband, by whom she had one son, by a settlement made in contemplation of a second marriage, settled a fund, upon the death of the survivor of herself and the intended husband, upon the usual trusts for the issue of the intended marriage, and if there should be no child who should become entitled thereunder a general power of appointment over the fund was reserved to her; and in default of appointment the fund was to be held, in the event of her predeceasing her husband, in trust for such person or persons as under the Statutes of Distribution would have become entitled thereto at her death, had she died possessed thereof intestate and "without having been married." There was no issue of the second marriage and the wife predeceased her husband without having exercised her power of appointment. On the death of the husband the question arose whether the son of the former marriage was entitled to the fund as next of kin:—

Held (by Viscount Birkenhead L.C., Lord Atkinson and Lord Sumner; Lord Buckmaster and Lord Parmoor dissenting), that the son was excluded by the terms of the ultimate trust, there being nothing in the context or in the circumstances of the case to modify the natural meaning of the words "without having been married."

Emmins v. *Bradford* (1880) 13 Ch. D. 493 and *In re Brydone's Settlement* [1903] 2 Ch. 84 approved and followed.

In re Forbes [1899] W. N. 6 overruled.

Decision of the Court of Appeal [1921] 1 Ch. 230 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Sargant J. (2)

By a settlement, dated October 26, 1892, made in contemplation of the marriage (shortly after duly solemnised) of Thomas Mullett Ellis and Mary Boyce a fund of 12,000*l.* belonging to the said Mary Boyce was settled after the death of the survivor upon trust for the issue of the said intended marriage as the said Thomas Mullett Ellis and Mary Boyce should jointly by deed appoint, and in default of such appointment as the survivor of them should by deed or will appoint; And in default of appointment upon trust for all the children or any the child of the said intended marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry and if more than one in equal shares; And if there should be no child of the said intended marriage who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry the fund was to be held (after the determination of the trusts thereinbefore declared) upon trust for such persons as the said Mary Boyce should when discovert by deed or whether covert or discovert by will or codicil appoint; And in default of appointment upon trust, if the said Thomas Mullett Ellis should survive the said Mary Boyce, for "such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Mary Boyce had she died possessed thereof intestate and without having been married."

---

* *Present:* VISCOUNT BIRKENHEAD L.C., LORD ATKINSON, LORD SUMNER, LORD PARMOOR, and LORD BUCKMASTER.

(1) [1921] 1 Ch. 230.

(2) [1920] 2 Ch. 432.

There was no issue of the marriage. Mary Ellis died without having exercised her power of appointment on March 13, 1893, in the lifetime of her husband. She had been once previously married—namely, to Charles Louis Boyce—but in February, 1889, she obtained a decree absolute of divorce against him. There was issue of that marriage one child, the appellant Charles Edward Sydney Boyce, who was born in September, 1887. In contemplation of the previous marriage Mary Ellis had by deed dated October 13, 1886, settled a sum of 5000*l.* Consolidated 3 per cent. annuities upon trusts under which the appellant became, in the events which happened, entitled on his attaining the age of twenty-one years to the whole of the settled fund. Contemporaneously with the settlement of October 26, 1892, Mary Ellis made a further settlement of 5000*l.* in favour of the appellant on his attaining the age of twenty-five years.

On the death of Thomas Mullett Ellis on August 20, 1919, the question arose whether upon the true construction of the settlement of October 26, 1892, and in the events which had happened, the fund thereby settled was held in trust for the appellant or for the persons who under the statutes of distribution would have been entitled thereto at the decease of Mary Ellis if she had died possessed thereof intestate and without ever having been married to Charles Louis Boyce or any other husband, and an originating summons was taken out by the trustees of the settlement for the determination of this question. Sargant J. held that the trust fund was held upon trust for the persons who would have been the statutory next of kin of Mary Ellis if she had died without ever having been married, and his decision was affirmed by the Court of Appeal, by a majority (Lord Sterndale M.R. and Warrington L.J.; Younger L.J. dissenting).

1922. Feb. 3. *Galbraith K.C.* and *Dighton Pollock* for the appellant. The words "without having been married" prima facie mean "without ever having been married," but they are flexible words and may be affected by the context in which they are found: Davidson on Conveyancing, 3rd ed., vol. iii., pp. 190–1; Wolstenholme's Forms and Precedents, 6th ed., p. 105, note (*c*); Norton on Deeds (1906 ed.), pp. 414-416. The settlement under consideration makes no mention of the previous marriage of the wife and is entirely directed to the marriage then in contemplation, and in these circumstances the words can properly be construed as meaning "without having been married as aforesaid" or "without having gone through the ceremony of the intended marriage." The intention of the ultimate trust was to exclude the husband and children of this particular marriage and nothing more, and to read the words "without having been married" as meaning "without ever having been married at all" would be to defeat the purpose and intent of the settlement: *In re Forbes* (1); *Clarke* v. *Colls* (2); *Wilson* v. *Atkinson* (3); *In re Ball's*

---

(1) [1899] W. N. 6.
(2) (1861) 9 H. L. C. 601, 612, 614.
(3) (1864) 4 D. J. & S. 455, 460, 461.

Trusts (1); *Upton* v. *Brown* (2); *In re Arden's Settlement* (3); *In re Mare* (4); *Stoddart* v. *Saville.* (5) Having regard to *Emmins* v. *Bradford* (6) and *In re Brydone's Settlement* (7) the appellant does not rely upon any general rule of construction supposed to be laid down in *Wilson* v. *Atkinson* (8) that in the ultimate trust of the wife's property in a marriage settlement for the wife's statutory next of kin as if she had died intestate and "without having been married" the words must be construed so as not to exclude the issue of the wife, but *Emmins* v. *Bradford* (6) and *In re Brydone's Settlement* (7), as also *In re Smith's Settlement* (9), are distinguishable in their facts from the present case.

[They also referred to *In re Hancock* (10); *Horseman* v. *Abbey* (11); *Morris* v. *Howes* (12); *Bond* v. *Taylor.* (13)]

Grant K.C. (with him *J. Harman*) for the respondents, the statutory next of kin. It is conceded that the natural meaning of the words "without having been married" is "without having gone through the ceremony of marriage." Therefore the onus is on the appellant to show why these words should not have their ordinary meaning given to them. If one looks at the settlement itself it contains nothing to alter that interpretation. The gift to the children is to the children of the intended marriage, and if the wife had been minded to include her born son she could have done so. Then in default of children a general power of appointment is given to her and it is only on her failure to exercise that power that the gift over takes effect. If one looks at the surrounding circumstances the position is the same, and in this case the wife did provide for the child of her first marriage. The cases relied on by the appellant proceed on the view that *Wilson* v. *Atkinson* (14) laid down a general rule of construction and must be taken to be overruled by *In re Brydone's Settlement.* (7) In *In re*

---

(1) (1879) 11 Ch. D. 270.
(2) (1879) 12 Ch. D. 872.
(3) [1890] W. N. 204.
(4) [1902] 2 Ch. 112.
(5) [1894] 1 Ch. 480.
(6) 13 Ch. D. 493.
(7) [1903] 2 Ch. 84.
(8) 4 D. J. & S. 455.
(9) [1903] 1 Ch. 373.
(10) [1896] 2 Ch. 173.
(11) (1819) 1 Jac. & W. 381, 385.
(12) (1845) 4 Hare, 599.
(13) (1861) 2 J. & H. 473.
(14) 4 D. J. & S. 455.

Ball's Trusts (1) Fry J. had great difficulty in following this supposed rule, as he thought that if the mother had not been married she could not have had a child capable of taking under the settlement, but he bowed to authority; and in the subsequent case of *Upton* v. *Brown* (2) he decided simply in deference to that rule. In *Emmins* v. *Bradford* (3) Jessel M.R. states the true principle and shows that the fact of a former marriage and the existence of children of that marriage does not constitute enough context to justify an alteration of the ordinary meaning of the words in question. In *In re Smith's Settlement* (4) Swinfen Eady J. treats the words as free from ambiguity, and this view was ultimately upheld by the Court of Appeal in *In re Brydone's Settlement.* (5) *In re Forbes* (6) is in direct conflict with *Emmins* v. *Bradford* (3) and cannot now be considered a binding authority in view of *In re Smith's Settlement* (4) and *In re Brydone's Settlement.* (5)

The Irish cases of *Hardman* v. *Maffett* (7) and *In re Deane's Trusts* (8) support the respondents' contention, and the former of those cases shows that there is no difference between the expressions "without having been married" and "without ever having been married."

Cecil Turner for the respondents, the trustees.

Galbraith K.C. replied.

The House took time for consideration.

1922. March 7. VISCOUNT BIRKENHEAD L.C. My Lords, Mary Ellis on October 24, 1892, executed a settlement in contemplation of her marriage with Thomas Mullett Ellis, which took place on the following day. She had been previously married to Charles Louis Boyce, by whom she had one child, the appellant, but the first marriage had been dissolved in 1889 by decree absolute. She had executed a marriage settlement on the occasion of her former marriage, and on October 26, 1892, she executed a voluntary settlement. These settlements do not influence my judgment. I mention them to make it plain that I have not omitted to notice their existence. There was no issue of the second marriage. Mary Ellis died on March 13, 1893, but her husband survived until August 20, 1919, when the settled fund fell to be distributed under the trusts of the settlement.

---

(1) 11 Ch. D. 270.
(2) 12 Ch. D. 872.
(3) 13 Ch. D. 493.
(4) [1903] 1 Ch. 373.
(5) [1903] 2 Ch. 84.
(6) [1899] W. N. 6.
(7) (1884) 13 L. R. Ir. 499.
(8) [1900] 1 I. R. 332.

This document, in the events which happened, vested in trustees a fund of 12,000*l.* upon trusts in favour of Mary Ellis and Thomas Mullett Ellis for their lives, then for "the issue of the said intended marriage," in accordance with an appointment, and, in default of appointment, for the children of the intended marriage, and in default of any child who should become entitled, Mary Ellis was empowered to appoint any one she pleased. The final trust in the event of T. M. Ellis surviving Mary Ellis (as he did) was in these words "in trust for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said Mary Boyce had she died possessed thereof intestate and without having been married."

At the crucial date the appellant was her next of kin and the question is whether he is or is not excluded by the expression "had she died . . . . without having been married."

The general rules of construction are well known and too well settled to be disturbed. It is elementary that the main purpose of those rules is to ascertain the intention of the party, having regard no doubt to the circumstances under which the document in question was executed or made, but, more important still, having regard to the language used and the context in which it is used.

The expression "without having been married" is, in my judgment, plain and unambiguous. To say of a person that she died without having been married conveys and conveys only the meaning that she died a spinster unless the context clearly shows that some other meaning was intended. For example, to say of B. that she became a widow in 1900 and died in 1920 "without having been married," can only mean that she remained a widow, but the expression in that connection is inapt, for it should have been stated that she died "without having been married again." I can find in this settlement no context which calls for any modification of the meaning which I must attach to these words. The settlement is executed in contemplation of a particular marriage and provision is made for the issue of that marriage in terms which limit the benefits to the issue of that marriage and no other, but when the clause in question is framed, the words used are no longer limited so as to apply only to the contemplated marriage; they are general and apply to any marriage. It would have been a simple matter if the marriage with T. M. Ellis were alone meant to have used a form of words, as in the preceding clauses, which would have made it clear. To have done so would not, in my opinion, have "explained the words actually used, but, on the contrary, have altered or modified their meaning."

I should have contented myself with the above reason were it not for the authorities that have been cited, and the distinction of the judges—commencing with Knight Bruce and Turner L.JJ. and ending with Younger L.J.—who have, or have been thought to have, held a contrary opinion.

It has been argued that in the case of marriage settlements at least there is a rule or principle whereby the words in dispute must be interpreted as excluding merely the husband of the settlor and not as excluding a child, whether by that or any other husband. The rule was supposed to have been established in *Wilson* v. *Atkinson* (1), but so far as the Courts below are concerned it was settled that no such rule exists by *In re Brydone's Settlement.* (2)

Wilson v. *Atkinson* (1) was a case where the clause containing the words which appear in the present settlement was followed by a declaration as to an existing child of the settlor, which clearly could have effect only if the children of the settlor were not to be excluded. It is an obvious example of the context requiring a modification of the ordinary

---

(1) 4 D. J. & S. 455.

(2) [1903] 2 Ch. 84.

H. L. (E.)
1922
BOYCE
v.
WASBROUGH.
Viscount Birkenhead L.C.

meaning of the words used, so as to give effect to the intention of the settlor. The Lords Justices so held, but their judgments were expressed in wider terms. Knight Bruce L.J. said (1) that the construction "without having been married to any one" was forbidden "independently of the following declaration," and Turner L.J. was more emphatic. He said (2), "Even if it be necessary to construe the terms of the trust for the next-of-kin independently and without qualifying them by the subsequent declaration, still, in my judgment, the trust for the next-of-kin ought not to be so construed as to exclude children."

Fry J. with some hesitation in *In re Ball's Trusts* (3), and without any expressed doubt in *Upton* v. *Brown* (4), followed the decision, as indeed he was bound to do, if, as he believed, *Wilson* v. *Atkinson* (5) did lay down a definite rule of construction that such words "merely . . . . exclude any husband of the wife and not . . . . any persons who may be her descendants."

The next case, *Emmins* v. *Bradford* (6), was tried by Jessel M.R., who was then a judge of first instance. The words in question there were, "without ever having been married." It seems that the Master of the Rolls did not think that the additional word "ever" made any difference and I agree with that view. He examined *Wilson* v. *Atkinson* (5) with great care, and came to the conclusion that it was a mere case of construction and did not lay down a principle of construction. He therefore construed the settlement as one where "the words are free from ambiguity and there is no context whatever to control them. It is said that you must look at the spirit and meaning of the instrument, but I have nothing to do with the intention of the parties not expressed, but with the plain meaning of the words used." In his judgment the terms of the trust excluded the children of the wife.

In re Arden's Settlement (7) was decided by Stirling J.,

---

(1) 4 D. J. & S. 460.

(2) Ibid. 461.

(3) 11 Ch. D. 270.

(4) 12 Ch. D. 872.

(5) 4 D. J. & S. 455.

(6) 13 Ch. D. 493.

(7) [1890] W. N. 204.

H. L. (E.)
1922
BOYCE
v.
WASBROUGH.
Viscount
Birkenhead L.C.

who, in the conflict of authorities, preferred the view of Fry J. to that of Jessel M.R. as to the effect of *Wilson* v. *Atkinson.* (1) The same observation applies to the decision of Chitty J. in *Stoddart* v. *Saville.* (2)

In re Forbes (3) is hardly in point, as the words were "a spinster and intestate." The case is noted in the Weekly Notes and in my opinion was not rightly decided, and I have the more confidence in saying so from the fact that Romer L.J. was a party to the decision in *In re Brydone's Settlement* (4), to which I refer later. Kekewich J. followed *Wilson* v. *Atkinson* (1) in *In re Mare.* (5)

So far the only case in which *Wilson* v. *Atkinson* (1) had not been regarded as laying down a binding rule was *Emmins* v. *Bradford* (6), but in 1903 the late Lord Swinfen M.R. (then Swinfen Eady J.) in *In re Smith's Settlement* (7), after reviewing all the authorities came to the same conclusion as Jessel M.R. Almost immediately, the Court of Appeal in *In re Brydone* (4) considered a settlement in which the words, unlike those in the cases decided by Jessel M.R. and Eady J. were, "without having married." Kekewich J. had followed his decision in *In re Mare* (5) without any additional comment. The Court of Appeal, before whom the effect of the decision in *Wilson* v. *Atkinson* (1) now came for the first time, held that that case did not lay down any general rule of construction, and as there was "nothing in the context or in any presumption which would justify us in giving to the words in question any other than their natural meaning," held that the children of the wife were not entitled.

This decision is not of course binding upon your Lordships, and therefore this House will not follow it unless in its opinion it correctly expresses the law. I think that it does so express the law. When a person executes a marriage settlement, no doubt primarily to provide for the married couple and their issue, it is open to the settlor to make such other provision for

(1) 4 D. J. & S. 455.
(2) [1894] 1 Ch. 480.
(3) [1899] W. N. 6.
(4) [1903] 2 Ch. 84.
(5) [1902] 2 Ch. 112.
(6) 13 Ch. D. 493.
(7) [1903] 1 Ch. 373.

such other persons as he or she intends. The intention is to be gathered from the words of the instrument. If, as may well be the case, the settlor has intended only to make provision for the marriage, then there would be no need to go on to provide for events in which neither the married couple nor their issue might be in existence to take an interest in the fund. On the other hand, if the settlor has determined to make a complete disposition of the fund, there is no warrant for assuming that existing interests or expectancies are not to be affected. It depends upon the settlement whether that is so or not, and it is not legitimate to infer from the circumstances that the settlor did not intend what is set down in the document. There may be many reasons why she might prefer collaterals to her own children, and, if she did, then effect must be given to the trust.

Nor do I assent to the proposition that the words in question are inserted merely for the purpose of excluding the husband. As was pointed out by Lord Wensleydale in his dissenting judgment in *Clarke* v. *Colls* (1), the husband was already excluded. Indeed no small part of Lord Cranworth's judgment was directed to explaining why their decision should be what it was, although in his view also the word there used was unnecessary for the purposes of excluding a husband, and therefore superfluous. The settlement in that case used the ambiguous word "unmarried," but it would appear that this House would have decided otherwise had the words used been those which are found in the indenture now before your Lordships. Indeed as has been pointed out by every judge who has criticised the supposed rule in *Wilson* v. *Atkinson* (2), the supposition that these words would exclude a husband but not a child is untenable, as the husband might easily, where the child has died before obtaining a vested interest, come in under the very trust in question which is ex hypothesi drawn so as to exclude him.

My Lords, for the reasons I have given, I am of opinion that the appellant is excluded by the plain meaning of the words in question, and that there is no context or rule which

(1) 9 H. L. C. 601.

(2) D. J. & S. 455.

modifies or alters that meaning so as to include him, and I accordingly move that this appeal be dismissed with costs.

I should have included in this motion a proposal that this appeal be dismissed with costs. But on the whole I am inclined to recommend a different course. It has long been a wholesome rule in litigation of this class that a plaintiff disclosing a reasonable case may invoke the assistance of the Court without being personally involved in liability for damages if he fail. It has been thought reasonable in such cases that the cost of resolving a reasonable doubt should be borne by the estate. But it has been equally held that if a plaintiff, being defeated in the Court below, chooses to carry his quarrel further, and fails in the appellate Court, he must himself support the expenses of an adventure pronounced by the result to be rash. To this salutary rule one exception may, I think, be admitted. If the course of the appeal in the appellate Courts discloses a difference of judicial opinion so clear and so persistent as to make it plain that there was in fact a legal issue to be debated both important and debatable, the indulgence may, in my opinion, be extended. In the present case Younger L.J. dissented from the opinion of the majority of the Court in the Court of Appeal. Lord Buckmaster and Lord Parmoor are dissentients from the judgment which I have just pronounced. Under these circumstances, I am of opinion that a very reasonable man, competently advised, might have thought it both his duty and his right to carry this matter beyond the Court of first instance. Under the circumstances, which must not be extended beyond the scope which I have carefully defined, I am of opinion that the costs should be paid out of the estate and I include this proposal in my original motion.

Lord Buckmaster. My Lords, the facts of this case and the relevant portions of the settlement have been fully explained; no further repetition is therefore necessary. The question for decision is merely whether the words used in the clause relating to the disposition of the settled property in the event of the decease of Mrs. Boyce in the lifetime of her husband without having exercised her power of appointment and without a child capable of taking the property, namely, "had she died possessed thereof intestate and without having been married," are equivalent to her having died a spinster, or whether they relate only to the marriage that was in contemplation when the settlement was executed.

The question is one upon which opinions may well vary, and I have the misfortune to differ from the judgment which has just been delivered by the Lord Chancellor in the conclusion that I have reached. The words themselves cannot, in my opinion, be regarded as unambiguous. They do not possess the same meaning in whatever context they are found, and no violence is done to the actual language by referring it to a particular contemplated ceremony. If, for example, the lady whose fortunes are the subject of Mr. Thomas Hardy's novel "A Laodicean" had been a widow and the book had ended without her marriage, it would not, to my mind, be inaccurate for anybody to say that the tale closed without the heroine having been married. It is needless to multiply illustration, for the statement appears to me only to form part of a wider and less controversial proposition that words often depend for their meaning upon the place where they are found. But if this be accepted, all that is left is to determine not what is the meaning of the words taken alone, but what is their true meaning in this document.

The settlement is one disposing of the lady's property. It was entered into in contemplation of the new relationship of marriage, and to regulate the results of this change with its immediate consequences, as well as its future possibilities in relation to the devolution of her estate. It is worth while to consider what that change might be. If immediately before the marriage the lady had died intestate, her son by her former marriage would have taken all her estate. If she had so died immediately after marriage with her property unsettled, her husband would have taken all her personal estate to the exclusion of the son, and it is only with her personal estate that the settlement deals. Every provision required for securing the benefits of the settled property to her future children is inserted, and it is only in the event of there being no child who attains twenty-one or being a daughter marries and no exercise of a power of appointment that the clause operates. It is in that event that the whole consequences of the relationship then contemplated are destroyed, and if no disposition is made of the property it is to pass as though she died intestate and "without having been married." I cannot help thinking those words can only mean without the marriage then in contemplation having been solemnised, for it is upon that marriage that the trusts of the settlement are called into being, and, in my opinion, it is to destroy the effects of that union, the chief of which was the disinheritance of the lady's own son, that the clause is introduced. It is unnecessary to contemplate the consequence of the opposite view if the words are plain, but it is certainly grotesque, for if the lady died intestate leaving no child to attain twenty-one in her husband's life her brothers and sisters exclude her son, but if she so dies after her husband her son again inherits.

I turn to see if there can be anything in the authorities to cause a modification of the view I have expressed, for most particularly in matters relating to conveyancing it is important not to disturb a long current of decision in obedience to which it may well be that people have regulated the disposition of their property. Now, apart from the present case, there is no single authority which has given to the actual words that are here in use a meaning adverse to the view I hold, and none that, in my opinion, affect their construction. In the earliest case of *Wilson* v. *Atkinson* (1) the words were construed so that the children of the then intended marriage were not excluded, and Knight Bruce and Turner L.JJ. suggested a rule of construction by which such words in a marriage settlement should not be considered as directed to children at all. This was followed with some hesitation by Fry L.J. (then Fry J.) in *In re Ball's Trust* (2) and again, upon reflection, in *Upton* v. *Brown* (1), where the actual words now under discussion were used, and the marriage was a second one, but it was a childless union and it was held that the child of the former marriage took the whole estate. The learned judge pointed out that were he excluded, so also would be children of a possible third marriage.

---

(1) 4 D. J. & S. 455.

(2) 11 Ch. D. 270.

This circumstance also influenced the decision of Lord Cranworth in *Clarke* v. *Colls* (2), and the contrast he there gives as to the two meanings of "unmarried" is as between "without ever having been married" or not having a husband living at the lady's death—a contrast the first branch of which Lord Wensleydale translates as equivalent to "never having been married." In this illustration I see nothing adverse to the opinion I hold.

In *Emmins* v. *Bradford* (3), which was the case of the marriage of a widow, the words used were "without having ever been married," and the Master of the Rolls held that this plainly excluded children of the first marriage. It may well be said that the words "without ever having been married" are equivalent to never having been married, as Lord Wensleydale appears to have thought, and themselves suggest the hypothesis that no ceremony of marriage had ever taken place. The words are certainly not identical with the more limited phrase used here, and no meaning can be given to the word "ever" if it be not intended to exclude any marriage at all.

Notwithstanding this, in *In re Arden's Settlement* (4) Stirling J. obeyed the direction in *Wilson* v. *Atkinson* (5); and in *Stoddart* v. *Saville* (6) Chitty J. held that on the marriage of a spinster the words "ever having been married" did not exclude the children of the marriage. In *In re Forbes* (7) Romer J., on the marriage of a widow, where the words were "if she died a spinster and intestate," held that the children of the former marriage were not excluded, an instance of obedience to authority rather than of trust in the English language. It appears, however, that in that case *Emmins* v. *Bradford* (1) was not quoted, but it shows how strongly the current of decision was running, even as late as 1899 (after the date of the present settlement), in favour of the liberal construction of the words.

---

(1) 12 Ch. D. 872.

(2) 9 H. L. C. 601, 612.

(3) 13 Ch. D. 493.

(4) [1890] W. N. 204.

(5) 4 D. J. & S. 455.

(6) [1894] 1 Ch. 480.

(7) [1899] W. N. 6.

In *In re Mare* (2) Kekewich J. again followed *Wilson* v. *Atkinson*. In *In re Smith's Settlement* (3), on the marriage of a spinster, the words being identical with those in *Emmins* v. *Bradford* (1), Swinfen Eady J. followed that decision and this again was accepted by the Court of Appeal in *In re Brydone's Settlement*. (4)

As this latter case appears to have influenced the decision of the Court of Appeal, it demands close attention. The marriage was that of a spinster, and the words used were the same as those in the present settlement, but the question was wholly different, for it necessarily related to the exclusion of the children of the contemplated marriage, and this was effected by giving the words what I regard as their natural meaning—namely, without the intended marriage having been solemnised. The judgment of Vaughan Williams L.J. shows that in part at least he was influenced by considering the circumstances and provisions attaching to those children alone. (5) Similar considerations affected the judgment of Romer L.J. (6), and, though not so materially, the judgment of Cozens-Hardy M.R. I think that case was rightly decided, but it does not, in my opinion, touch the present issue.

It may well be argued, however, that these authorities show that a more robust method of construction has now been adopted by the Courts in determining the meaning of wills and settlements than that which formerly obtained. I do not find myself out of agreement with such a view. Plain words should be given their plain meaning, and confusion is often caused and litigation multiplied by attempting to impose upon clear language a meaning depending upon the

(1) 13 Ch. D. 493.
(2) [1902] 2 Ch. 112.
(3) [1903] 1 Ch. 373.
(4) [1903] 2 Ch. 84.
(5) [1903] 2 Ch. 93.
(6) Ibid. 94.

assumptions of what any party must be supposed to have meant. The only way of testing that intention is to see what has been said. But I confess that in a case like the present, where I have the misfortune to find myself at variance with other members of the House and also with three of the learned judges who have tried this case, I find some consolation in the belief that the view I hold would have commended itself to many of the most eminent men who during the last fifty years have sat in the Court of Chancery or in the Court of Appeal.

I have not referred to the settlement made on the lady's son shortly before her second marriage, for it appears to me irrelevant on the real issue, which is whether the settlement shows and carries out an intention to benefit the lady's brothers and sisters at the expense of her own offspring.

LORD ATKINSON. My Lords, I concur with the judgment which has just been delivered by the Lord Chancellor. By the express terms of Mrs. Ellis's marriage settlement, a provision is made for the contemplated children of the union she was about to enter into. The trustees were, in the events mentioned, to hold the trust funds and the income thereof, "in trust for all or any such one or more of the issue of the said intended marriage in such manner and form in every respect as the said Thomas Mullett Ellis and Mary Boyce shall by deed jointly appoint And in default of and subject to such appointment as the survivor should by deed or will or codicil appoint And in default of and subject to any such appointment, in trust for all the children or any the child of the said intended marriage who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry and if more than one in equal shares." She thus expressly excluded these children from all benefit arising from the trust funds put in this settlement in default of appointment, or in so far as an appointment should not extend, unless they fulfilled the conditions stated—namely, that if boys they should reach twenty-one years of age, and if girls they should reach that age or marry under that age. The settlement goes on to provide what is to become of the trust fund should all the contemplated children fail to fulfil this condition—namely, this, that the trustees should hold the trust funds and the annual income thereof, or so much thereof as shall not have become vested or been applied under any of the trusts and powers contained in the settlement, or implied by statute, in trust for such persons or purposes, and in such manner as the lady when discovert by deed, or whether covert or discovert by will appoint, and in default of and subject to any such appointment if she should survive her husband in trust for herself without power of anticipation, but if he should survive her, then in trust for such person or persons as should, under any statute of distribution of the effects of intestates, have become entitled thereto at her decease had she died possessed thereof "intestate and without having been married."

I confess I feel insuperable difficulty in coming to the conclusion that behind this ultimate limitation there lies concealed an intention in the mind of this lady that the contemplated children of the union she was about to form should, if boys, though dying under twenty-one years of age, and if girls dying under that age and unmarried, ever become absolute owners of this trust fund in equal shares. On the contrary, I am very much of the same opinion as that expressed by Cozens-Hardy L.J. in *In re Brydone's Settlement.* (1) That learned judge, speaking of a similar ultimate limitation, said: "The plain intention, as it seems to me, was that the provision actually made in the prior part of the settlement for the children of the marriage was all that was intended to be made for the issue of the marriage." The trust with which we are dealing was to become operative only in the event of there being no child who should attain twenty-one, or, if a daughter, should marry; and indeed it would be strange if the effect of the subsequent limitation was to give to children who did not take any vested interest under the prior trust an absolute interest in the fund."

So I, in the present case, am of opinion that it never could have been the intention of this lady to give to the children of her intended marriage who did not take any vested interest in the trust funds under the earlier limitation an absolute interest under the final limitation in these very trust funds. But if, by the express provision of the settlement, the children of the intended marriage are excluded from taking interests in these trust funds under the ultimate limitation, where is one to find the proof of an intention that the very young child, as he then was, who in the settlement is never alluded to, who was the offspring of a marriage which is never there alluded to, and on whom she had by a deed contemporaneous with this settlement bestowed a sum equal to nearly half the trust funds, should under this ultimate limitation take an absolute interest in the fund which the children of the intended marriage would be precluded from taking? It would certainly be a strange intention if it existed. Whatever force there may be in the argument that it should be presumed that it was not intended that the children of an intended marriage should be excluded by the limitation of a settlement made in contemplation of the marriage of which they are offspring from all benefit from the funds put in settlement, it cannot, I think, apply to the offspring of an earlier marriage already fully provided for. The fact that the limitation is found in the marriage settlement of this child's mother made in contemplation of a marriage with some one other than his father, and that the trust fund was contributed by this mother, cannot, I think, per se, afford sufficient evidence of such an intention.

---

(1) [1903] 2 Ch. 84, 97.

No doubt, if in construing a written document one finds that, looking at the context of some phrase or provision used or contained in it, and also at the surrounding circumstances, a non-natural meaning must be given to that phrase or provision in order to carry out the intentions of the parties to the instrument, then that meaning should be given to them, and the instrument construed accordingly. But I think the authorities establish that the mere fact that the words "without having been married" are used does not in a marriage settlement, though the trust fund was contributed by the lady, afford any presumption that the parties intended to use the words in other than their ordinary grammatical sense, and therefore as equivalent to the words "without ever having been married."

In *In re Brydone's Settlement* (1) the words in the ultimate limitation of the trust fund were there, as here, "to such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of the said Sophia M. Crofton if she had died possessed thereof and intestate and without having been married." This lady died intestate on April 22, 1871, having previously given birth to twins. These children only survived their mother by about eighteen months. They died in October, 1872. H. G. Brydone, the husband of the deceased lady, died on December 26, 1901, having made a will. A summons was taken out by the trustees of the settlement as plaintiffs against the sole next of kin of the first wife, and the executors of H. G. Brydone, deceased, as defendants, asking for the determination by the Court of the question whether the trust funds belonged to the next of kin of the first wife or to the legal personal representative of the deceased children.

On appeal from the decision of Kekewich J. in favour of H. G. Brydone as legal personal representative of the deceased children and next of kin of their mother, the earlier authorities having been cited and examined, it was held: (1.) That it must not be taken to have been laid down as a general rule in *Wilson* v. *Atkinson* (2) that in an ultimate trust of a wife's property contained in a marriage settlement for her statutory next of kin as if she had died intestate and "without having been married," the words must always be construed so as not to exclude issue of the wife: (2.) That the words in question ought prima facie to be construed according to their natural meaning, which would exclude the issue of the wife, unless there was something in the context or in the circumstances of the case which would show that these words were not intended to bear that meaning. This is not, I think, affected by the fact that the lady in this case was a spinister when she formed

(1) [1903] 2 Ch. 84.

(2) 4 D. J. & S. 455.

the union in reference to which the settlement was made. (3.) That the sole statutory next of kin of the wife at the time of her death (excluding the infant children) was entitled to take. It was pointed out by Vaughan Williams and Cozens-Hardy L.JJ. that Lord Cranworth's observation in *Clarke* v. *Colls* (1) was that the clause there to be construed was the same as that in the present case, except that the word "unmarried" was used instead of "without having been married," which, Lord Cranworth said, "might mean either without ever having been married," or "not having a husband living at her death." If the former construction were adopted, then, if the wife should survive her husband and afterwards marry and have children, her collateral relatives would take the fund, to the exclusion of her own issue. If the latter construction were adopted, then no such result would follow. This seems to me conclusive. It is impossible to suppose that the framer of the settlement intended to use the word in a sense which would exclude the possible issue of the wife in favour of her "collateral relations." Lord Cranworth, who, with Lord Campbell, formed the majority, expressly said that the result would have been different if the words had been "without having been married." I cannot find any authority later in date than the case of *In re Brydone's Settlement* (2) inconsistent with it. I think the reasoning on which the judgments in that case are based is quite convincing and the conclusion right. And I think it is impossible to distinguish the present case from it. I think, therefore, that the decision of the Court of Appeal, which is really based upon *In re Brydone's Settlement* (2), was right, and that this appeal fails and should be dismissed. I approve of the suggestion of the Lord Chancellor that the costs should be paid out of the assets.

LORD SUMNER. My Lords, the seven words "had she died . . . . without having been married," which are to be construed in this case, are simple enough, nor does it affect the question to recall that they are commonly used. It cannot be

(1) 9 H. L. C. 601. (2) [1903] 2 Ch. 84.

predicated of a dead woman, that she died without having been married, if in her lifetime she had ever gone through a legal and binding ceremony of marriage. "To be married" has no other "ordinary," or, for that matter, extraordinary meaning. Any one who uses these words, meaning thereby that the lady had been married once, but died without having been married again, simply fails to express his meaning. I desire to give all due weight to the context in which the words occur, and to the circumstances under which the settlement was executed. The first is the more important matter. I agree that, in a settlement on a second marriage where there are children by the first, the principal object is to provide for that alteration in the settlor's property and position, which will follow from the marriage and its contemplated issue, and that changes in the position of the children of the former marriage in relation to their parent's property as next of kin are quite a minor object and need not be expected, except in so far as they are involved in such arrangements as the intended marriage itself necessitates. Changes may, however, be intended and may be given effect to by the settlement over and above what the occasion itself would require, and the whole question always comes back to the conventional problem of penetrating the settlor's mind through the artificial language used by the draftsman. This is legally a question of construction of that language. The most that the context in this case can do for one is to incline one against the exclusion of the appellant, and I think the degree of this inclination is but slight. It was a matter for his mother to decide. A Court of law has nothing to do with it except to gather her decision from her words.

I understood it to have been admitted in argument, and, if so, it was rightly admitted, that the appellant's case fails, unless what the law recognizes as ambiguity is to be found in the words in question. As to the words being "flexible," I do not know what that means. The legal rule of construction, at any rate, is not flexible. No one contends that the words cannot bear the sense which is fatal to the appellant's claim; the first step for him to take is to show that they

H. L. (E.)
1922
Boyce
v.
Wasbrough.
Lord Sumner.

can bear any other. Only after that is shown need it be argued that this other sense is preferable, and is the true one. For the purpose of legal construction ambiguity means that, within the limits of ordinary English usage and the rules of correct grammar, a word or a phrase is reasonably capable of bearing more than one sense, and that without ceasing to be accepted and correct English. Terms of art I leave aside, for there are none here. The words are only plain English, though they are words which, in this connection, conveyancers often use.

My Lords, in my opinion there is no word here that is or can be used in two senses. The expression is not "dies unmarried," but "without having been married." Now a person has been married or has not, and there is an end of the matter. Nor do I see how this phrase can have two senses as it stands, context or no context. To read the words as meaning "without having been married again," or "without having been married, as aforesaid," or "without having been married to Thomas Mullett Ellis," or "without having been married to any one but Charles Louis Boyce," is not reading the words in an alternative sense, but is altering their meaning by adding more words. The real reason for adding more words is not that the meaning of the words, as they stand, is doubtful, but because their effect is thought to be unusual and possibly harsh. The real doubt that arises thereon is, not what the settlor's words mean, but whether she fully appreciated what she was doing. I cannot say that I feel any such doubt. Matters dehors the deed ought not to control its construction, but they may, at any rate, be used to lay a doubt of this kind. The settlor had independently provided for the appellant, whether handsomely or not, I cannot say, though the amounts mentioned are large. She might have done something more for him in this deed by name, but she did not. Ex hypothesi this change in his position, against which he appeals, only arises in the event of his mother not having cared to exercise an express power of appointment, which would, at any rate, have put an end to any controversy. I see no reason to suppose that the words, as construed by the Court of Appeal, are not the result of full comprehension on the settlor's part.

My Lords, on the face of the deed itself, I notice, that wherever the word "marriage" is used in reference (as it always is) to this intended marriage, the marriage is so described. "Discovert," used without qualification, occurs in one clause, but "intended coverture" occurs in the next one, and the use of the unqualified word "discovert" raises, in any case, the same question as that now in debate, is open to the same answer, and therefore carries matters no further.

As for the authorities, I am entirely satisfied with Lord Sterndale's convincing review of them. The rule, which was supposed to have been established in *Wilson* v. *Atkinson* (1), was shaken to its foundations by Jessel M.R., in *Emmins* v. *Bradford* (2), and was finally disestablished in the case of *In re Brydone's Settlement.* (3) I do not know that your Lordships were asked to restore it. With the rule in *Wilson* v. *Atkinson* (1) go the cases, in which judges of first instance, high as their authority stands, merely applied a decision which they conceived to bind them. Turner L.J.'s words: "the trust for the next-of-kin ought not to be so construed as to exclude children," whether he so intended it or not, were taken in these earlier cases to lay down a principle that no legal child could be excluded from the next of kin in this kind of clause, which is really treating the supposed purpose of conveyancers in inserting it—namely, the exclusion of the other spouse only—as equivalent to the settlor's own meaning. The actual deed construed in *Wilson* v. *Atkinson* (1) differed from that in the present case, nor are decisions in point, in which there was question of a first marriage only. Being quite unlearned in these matters I merely think it my duty to express an opinion on the construction of plain English words, but the hesitation which I should naturally feel in differing, if it be differing, from Turner L.J., and Fry and Romer JJ., is removed by recalling.

---

(1) 4 D. J. & S. 455.
(2) 13 Ch. D. 493.
(3) [1903] 2 Ch. 84.

the authority to the contrary of Jessel M.R., Cozens-Hardy L.J., and of the majority in the Court of Appeal in the present case.

I ought not, however, to pass by the judgment of Younger L.J. without the close examination to which all his learned and careful opinions are entitled. Agreeing that the words necessarily mean "without ever having been married" in the absence of a context, he finds in the context, which is simply that they occur in a settlement on an intended second marriage, ground for saying that the words are susceptible of another interpretation, owing to a reasonable ambiguity about them. Presuming that the purpose of the instrument is to provide for the proposing husband and wife and the issue of their intended marriage, that purpose would, he says, be defeated, if the position of a child of the earlier marriage were modified under merely general terms contained in it. I think this argument is only valid if the presumption made is that the only purpose is that stated, and I should have thought, in the first place, that plain words prevailed against a presumption and not a presumption against the words, and, in the second, that this argument confuses the purpose of the draftsman (who, no doubt, frames these common clauses for marriage settlements generally), with the purpose of the settlor, who is deemed to intend particularly whatever the language of his deed says. Younger L.J. (1) very justly points out that, in the cases which purported to follow the supposed rule in *Wilson* v. *Atkinson* (2) "the Courts were led" to the conclusion adopted "by the view they took, that, the object of the clause being to defeat the husband only, it was permissible to construe it in a way which would have that result," a construction which he truly says is impossible. Yet the process he himself adopts is substantially the same. The assumed object of the settlement being to provide only for the intended marriage and its consequences and not otherwise to disturb existing interests, he puts on plain words a limited construction "which would have that result." He asks, "Can it be supposed that this lady intended to give this property in any event to her collateral relatives in preference to her own son by her first marriage?" To this I can only say, that I do not see why it cannot, for, when you come to feelings towards near relations in connection with money, it is unsafe to presume anything. "Why," the Lord Justice then proceeds, "she should choose the occasion of a further marriage . . . . to divert the residue from her own existing children . . . . to remoter relatives, it is difficult indeed to see. Can it be doubted that any such diversion is entirely foreign to the transaction in hand and in the normal case beyond contemplation?" I can only say to the first question, that if she had some reason for it (and I could guess at half-a-dozen) I do not see why she should not do so, and to the second, that the diversion is not foreign to the transaction in hand, if that is what she wanted to do by the transaction. It is really only by begging the question, if I may say so without offence, that we get that context, which is admittedly the basis of the supposed ambiguity. The argument would have been cogent in support of a proposal to substitute the word "remarried" for "married" in the draft, but, as a ground for discovering in the actual words used an ambiguity, which does not exist, on the strength of the purpose, with which "a common form clause . . . . is so framed as to be suitable for insertion in a marriage settlement without reference, so far as it goes, to any particular circumstances," I think it is too hypothetical to give a sure foothold. It is true that the former marriage is not mentioned in this settlement elsewhere, if it be not referred to in this passage; in fact, any more specific allusion to it is rather obviously kept off the deed, no doubt for personal reasons; but really this carries the matter no further, for, if it is sufficiently referred to in the words in question, that is enough without its being referred to again, and the reference must have effect, even though it might have been made with a particularity, which the lady precisely desired to avoid.

---

(1) The quotations from Younger L.J.'s judgment are taken from the Appendix.
(2) 4 D. J. & S. 455.

My Lords, if the interpretation adopted by both Courts

H. L. (E.)
1922
BOYCE
v.
WASBROUGH.
Lord Sumner.

below had been one which involved any repugnancy, or defeated the scheme of the settlement, or reduced the transaction to an absurdity, of course different considerations would arise. Such cases logically bear more resemblance to rectifying a mistake in the deed than to construing an ambiguity. If the strict integrity of the principle of giving effect to the words used in their ordinary and grammatical sense were sincerely adhered to, it might have seemed better to say that, if parties will make their deed talk nonsense, a nonsensical decision is all that can be given them, but at any rate, whatever it is called, the rule is well settled, that the absurd results of the better construction, that is, grammatically the better one, may compel the adoption of another and a worse one. It is enough for the present to say that no case of this kind is made here.

My Lords, I think the appeal fails.

LORD BUCKMASTER. My Lords, my noble and learned friend Lord Parmoor desires me to say that he agrees with the opinion that I have expressed.

Order of the Court of Appeal affirmed, and appeal dismissed. The costs of both parties to this appeal to be paid as between solicitor and client out of the fund in medio.

Lords' Journals, March 7, 1922.

Solicitors for the appellant: *Vizard, Oldham, Crowder & Cash.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for William Walker, Manchester.*

[HOUSE OF LORDS.]

L. FRENCH AND COMPANY, LIMITED APPELLANTS;

AND

LEESTON SHIPPING COMPANY, LIMITED . . . . } RESPONDENTS.

H. L. (E.)*
1922
March 10.

Shipping—Charterparty—Shipbroker—Commission—Time Charter—Sale of Ship to Charterer during Charter Period—Right of Broker to Commission for whole Charter Period.

Shipbrokers employed to effect a charter of a steamship procured a charter for eighteen months, but after four months of the charter had run the owner sold the vessel to the charterers and the charterparty was cancelled. The charterparty provided for payment of a commission of 2½ per cent. on the hire paid and earned under the said charterparty and on any continuation thereof.

In an action by the brokers to recover commission for the remainder of the charter period:—

Held, that it was not an implied term of the contract that the shipowners should not agree to put an end to the charterparty by the sale of the ship to the charterers, and that the action failed.

White v. *Turnbull, Martin & Co.* (1898) 3 Com. Cas. 183 approved.

APPEAL from an order of the Court of Appeal affirming a judgment of Roche J. in favour of the respondents, the defendants in the action.

The appellants were shipbrokers carrying on business in London, and the respondents were the owners of the steamship *Clematis*. In May, 1919, the appellants arranged a charter of the steamship to John Holt & Co. (Liverpool), Ld., for eighteen calendar months at a hire of 28*s.* 9*d.* per ton per calendar month, which came to 82,138*l.* 3*s.* 9*d.* per calendar month.

Clause 30 of the charterparty provided that a commission of 2½ per cent. on the hire paid and earned under the said charterparty and on any continuation thereof should be paid to the appellants for division.

Four months hire was paid and earned under the charterparty and the respondents duly paid the commission thereon to the appellants.

---

* *Present:* LORD BUCKMASTER, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD CARSON.

By an agreement in writing dated April 16, 1920, the respondents agreed to sell the steamship to the charterers for 130,000*l.*, and by clause 11 it was provided that the agreement should cancel the charterparty and that any claims connected with the charterparty for brokerage or otherwise should be on account of the respondents.

The appellants demanded payment from the respondents of the commission on the hire of the steamship for the remaining fourteen months of the charterparty period, and on the refusal of this demand by the respondents they issued the writ in this action claiming 2876*l.* 6*s.* for commission earned as shipbrokers. The action was transferred to the Commercial Court.

The appellants by their points of claim alleged that it was impliedly agreed between the parties that the respondents should not wilfully and/or by any act of themselves or their agents determine the charter or prevent the payment of hire thereunder, and that the respondents had prevented the appellants earning the full sum due to them as commission by selling the steamship to the charterers and thereby terminating the charterparty; and they claimed 2876*l.* 6*s.* as the balance of commission due to them and/or for work done by the appellants on behalf of the respondents and/or as damages for breach of the agreement. The respondents by their points of defence denied that the charterparty was subject to the alleged or any implied term.

Roche J. gave judgment for the respondents and the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) affirmed this judgment on the authority of *White* v. *Turnbull, Martin & Co.* (1)

Leck K.C. and *Le Quesne* for the appellants. The respondents, having received the full benefit of the appellants' services, are not entitled by their voluntary act to deprive the appellants of part of their remuneration for those services.

(1) 3 Com. Cas. 13, 183.

The contract implied an obligation on the part of the respondents that they would not by selling the ship put it out of their power to allow the appellants to earn their remuneration. *White* v. *Turnbull, Martin & Co.* (1) is distinguishable, because in that case the charterparty was put an end to as the result of a compromise of legal proceedings and the agreement was forced upon the parties. The judgment of the Master of the Rolls in *Ogdens* v. *Nelson* (2) applies to this case.

MacKinnon K.C. and *Jowitt K.C.* for the respondents were not called upon.

Lord Buckmaster. My Lords, the appellants are a company that carry on the business of shipbrokers and the respondents are a shipping company owning a line of steamers. The action out of which this appeal has arisen was brought by the appellants against the respondents claiming commission upon freight that according to the contention of the appellants ought to have been earned by one of their steamships known as the *Clematis* and was not so earned owing to the action of the respondents. The commission was payable under a charterparty dated May 30, 1919, and made between the respondents as the owners and John Holt & Co. as charterers of the vessel. The charter was a time charter for the period of eighteen months, and it contained among other clauses a clause, No. 30, which provided that "A commission of 2½ per cent. on the hire paid and earned under this charter and on any continuation" was to be payable to the present appellants. There are other provisions in the charter to which it is not necessary to refer, for none confer any larger rights upon the appellants. There is no other document in the case and no claim made or indicated by the evidence based upon any other contract. The rights, therefore, as between appellants and respondents are to be found in the terms of that document and nowhere else, and the initial difficulty due to the fact that the appellants are suing on a contract to which they were not parties has been overcome by assuming that the charterers were

(1) 3 Com. Cas. 183.

(2) [1904] 2 K. B. 410; [1905] A. C. 109.

H. L. (E.)
1922
L. French & Co.
v.
Leeston Shipping Co.
Lord Buckmaster.

trustees for them of the benefits it confers. I accept without any opinion for the purpose of this appeal, that that assumption is well founded. Freight was earned under the charterparty and commission was paid, but on April 16, 1920, the vessel was sold, and from that time no further freight was earned and no further commission was paid. It is to recover the balance of commission for the remainder of the term that proceedings were originally brought.

Those proceedings have met with uniform ill-success. The plaintiffs' action failed before Roche J., and an appeal from his decision was dismissed by the Court of Appeal. The Court of Appeal have, quite rightly, based their judgment upon the fact that the case of *White* v. *Turnbull, Martin & Co.* (1) is a complete and conclusive authority upon the point which, at any rate, bound their judgment. My Lords, that decision does not bind your Lordships' House, and it becomes necessary to consider whether you agree with its effect. I have no hesitation in saying that I agree with the conclusion that was then reached and with the reasoning upon which it was based. It is pointed out by Chitty L.J. in that case, in which the facts were closely similar to the present, though the charterparty had been cancelled under different conditions from the conditions which have caused the cessation here, that in order to enable the plaintiff to succeed it would be necessary to introduce into the charterparty an agreement by which the shipowner must be taken to say, "I will not terminate the charterparty under any circumstance by agreement," and he adds, "It seems to me that that implication cannot be maintained."

My Lords, I agree. It is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the Courts excepting under the pressure of conditions which compel the introduction of such terms for the purpose of giving what Lord Bowen once described as "business efficacy" to the bargain between the parties. There is no need whatever in the present case for the introduction of any such term.

---

(1) 3 Com. Cas. 183.

The contract works perfectly well without any such words being implied, and, if it were intended on the part of the shipbroker to provide for the cessation of the commission which he earned owing to the avoidance of the charterparty, he ought to have arranged for that in express terms between himself and the shipowner.

My Lords, I have not referred in what I have said to the circumstances that would need to be regarded provided it were established that the destruction of the position upon which the right to commission arose was expressly effected by the person bound to pay the commission for the purpose of relieving himself from liability for payment. There is no evidence of anything of the kind before your Lordships in this case; we only know that, in the exercise of the undoubted rights of ownership which the respondents possess, the vessel in this case was sold, and the charterparty came to an end.

LORD DUNEDIN. My Lords, I concur. I would only like to add one observation as to the reservation which was made in *White's Case* (1), and which seems to have rather troubled Bankes L.J. in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done, and which should have had as its sequel the non-earning of further commission, had been done by the doer of it, not prima facie for a purpose of his own, but simply and solely to avoid payment of the commission.

LORD ATKINSON. My Lords, I concur.

LORD SUMNER. My Lords, the words which define the subject matter, on which this commission is to be paid, are to be found in the print in clause 30, namely, "On the hire paid and earned under this charter." As no hire was paid and earned in respect of the period in question, it appears to me to be clear that debt could not lie for the sum sued for. It must, therefore, be damages, that is to say, the plaintiff

(1) 3 Com. Cas. 183.

H. L. (E.)
1922

L. French & Co. v. Leeston Shipping Co.

Lord Sumner.

must satisfy your Lordships that there has been a breach by the defendants of some obligation in his favour to be implied from the charter. That obligation virtually is that the shipowner will not sell his own ship during the chartered term. No authority has been produced for the implication of such a stipulation. It would be all the more curious, because it is not suggested that there is any stipulation that the other parties, the charterers, to whom, on behalf of the plaintiffs, the promise to pay commission is given, will not buy the ship during the term of the charter, and the odd part of it is that, there being no direct contract between the brokers and the shipowner (the contract being made on their behalf by the charterer), it is supposed that the undertaking arises only between the shipowner, who is deemed to be the employer, and the charterer, who is neither broker nor employer, although the charterer equally with the shipowner puts an end to further commission by joining in the purchase and sale.

I see no reason to doubt that *White* v. *Turnbull, Martin & Co.* (1) was correctly decided, or to think that it can be distinguished from the present case.

My Lords, I agree that the appeal fails.

Lord Carson. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 10, 1922.

Solicitors for the appellants: *Charles Lightbound & Co.*
Solicitors for the respondents: *Holman, Fenwick & Willan.*

---

(1) 3 Com. Cas. 183.

[PRIVY COUNCIL.]

J. C.*
1922
Feb. 14.

MACKAY . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Acquisition of Land—Public Works—Contract by Minister—Necessity for Order in Council—Public Works Act (R. S. B. C., 1911, *c.* 189), *ss.* 3, 37.

By the Public Works Act (R. S. B. C., 1911, c. 189, as amended in 1914) the Lieutenant-Governor in Council may acquire, for and in the name of His Majesty, land which in his judgment is necessary for certain specified public purposes, and the Minister of Public Works may for such purposes enter into contracts which are not to be valid unless sealed with the seal of his department:—

Held, that a contract made by the Minister for the purchase of land for a public purpose does not bind the Crown unless the acquisition of the land has been authorized by an Order in Council, or a resolution in Council amounting to an order, even if the contract is sealed with the seal of the department.

Churchward v. *The Queen* (1865) L. R. 1 Q. B. 173 and *Commercial Cable Co.* v. *Government of Newfoundland* [1916] 2 A. C. 610 applied.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (April 29, 1921) affirming the judgment of Gregory J. (May 14, 1920).

The appellant by an originating summons in the Supreme Court of British Columbia sought to enforce pursuant to s. 15 of the Arbitration Act (R. S. B. C., 1911, c. 11) an award for $107,400 made in an arbitration between the appellant and the Minister of Public Works for the Province, representing the Crown. The circumstances in which the award was made appear from the judgment of the Judicial Committee.

Gregory J. dismissed the summons and that decision was affirmed, though on a different ground, by the

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW, and LORD PHILLIMORE.

J. C.
1922
MACKAY
v.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Court of Appeal (Macdonald C.J.A., Galliher J.A. and Eberts J.A.; McPhillips J.A. dissenting). In the opinion of the majority the contract of purchase containing the submission to arbitration, which contract was made under the Public Works Act (R. S. B. C., 1911, c. 189), as amended by the Public Works Act Amendment Act, 1914, c. 58, s. 2, was invalid on the ground that the appellant had not proved any Order in Council authorizing the making of the contract.

1922. Jan. 26, 27. *Hon. Sir Malcolm Macnaghten K.C.* and *Theobald Mathew* for the appellant. Having regard to the terms of s. 3 of the Public Works Act an Order in Council was not necessary. (1) The decision of the Board in *Rex* v. *Vancouver Lumber Co.* (2) which was relied on in the Court of Appeal is not applicable. It was, no doubt, said in the judgment in that case that an Order in Council was there necessary. The case, however, arose under 57 & 58 Vict. (Dom.), c. 26, which provides that the Governor in Council "may authorize" sales or leases of certain lands. The Act now in question does not refer to "authority" being given by the Lieutenant-Governor. Secondly, if an Order was necessary, the evidence as to the recognition by the Government of the validity of the transaction threw on the Crown the onus of proving that there was no proper Order in Council. That onus was not discharged. The affidavit filed stated merely that there was no Order as to the particular lots purchased; it did not say that there was no Order authorizing the acquisition of the land necessary for the public work contemplated. An Order to that effect would have been sufficient under the Act. If the appellant's contentions fail, there should be no order for costs against him: *Johnson* v. *The King.* (3)

Sir John Simon K.C. and *Hon. Geoffrey Lawrence* for the respondents were not called upon.

---

(1) The terms of the section sufficiently appear from the judgment.

(2) (1920) 1 West. Weekly Rep. 255. This appeal is not reported in the Law Reports; the arguments and the judgment proceeded on the question of fact whether an Order in Council had been made.

(3) [1904] A. C. 817.

Feb. 14. The judgment of their Lordships was delivered by VISCOUNT HALDANE. This appeal arises out of proceedings taken in the Supreme Court of British Columbia in order to enforce an award. The appellant alleges an agreement, expressed to have been made between the King in right of the Province, represented and acting by the Minister of Public Works, and the appellant, dated August 23, 1916, under which certain lands in the City of Vancouver, on the recital that the Lieutenant-Governor in Council of the Province had deemed it necessary to acquire them, were contracted to be sold by the appellant to the Sovereign, at a price to be determined by arbitration. Under this agreement, the award sought to be enforced was made. Since then the Government of the Province has changed, and the new Ministers have refused to advise the agreement to be carried out, alleging among other things, that there was no evidence that its execution had been authorized by the Lieutenant-Governor in Council, or that it was sealed with the seal of the Department of Public Works.

By s. 3 of the Public Works Act of the Province (R. S. B. C., 1911, c. 189, amended in 1914) the Lieutenant-Governor in Council may acquire and take possession, for and in the name of His Majesty, of lands for purposes which would include those in controversy, and all contracts for so acquiring them are to be valid. By s. 37 the Minister, in this case the Minister of Public Works, is to have power to enter into any contract required for carrying out the provisions of the Act, but no such contract is to be binding on him unless signed by him and sealed with the seal of his Department.

After the award had been made, the appellant's solicitors wrote to the then Premier of the Province, requesting payment of the amount of the award, which had been properly made, so far as its form was concerned. The then Premier, who was still in office but was about to resign it, replied that, so far as his Government were concerned, they were satisfied with the award, and would recommend it to their successors for payment of its amount, but that, being an outgoing Government, they were not in a position to place before the Lieutenant-Governor a special warrant for payment. He agreed, however, to pay a share of the expenses of arbitration already incurred.

A little later on the appellant presented a petition of right for payment of the amount awarded, but the new Government refused the petition on the ground that there was no record that the execution of the agreement to purchase had been authorized by the Lieutenant-Governor in Council, and that the agreement was not sealed with the seal of the Department of Public Works, nor had there been any accepted plans for the construction of the public works for which the land was said to have been required.

On January 19, 1920, the submission to arbitration was made a rule of the Supreme Court of the Province, and the present proceedings were commenced to enforce the award. Gregory J. dismissed these proceedings, on the ground that the agreement did not constitute a submission to arbitration. It is, however, unnecessary to enter into this question, if the Court of Appeal, to which the case was carried, were right in a further reason for which they dismissed the appeal. The Chief Justice, Galliher and Eberts JJ., held, McPhillips J. dissenting, that no agreement could be validly made by the Minister of Public Works, unless an Order in Council had first been passed providing for the acquisition of the land, and that the appellant had failed to prove that any such Order in Council had been passed. The Chief Justice said that, although it had been suggested that the transaction had the approval of the Cabinet, there was no suggestion that it had the assent or had ever been brought to the notice of the Lieutenant-Governor. McPhillips J. held that an Order in Council was not a condition precedent to the making of a binding agreement; that the agreement contained a well-constituted submission to arbitration; and that the Crown was, in the circumstances, estopped from denying the validity of the agreement and the award.

With the view of McPhillips J. as to the Order in Council not being required, their Lordships are unable to agree.

J. C.
1922
MACKAY
v.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Under s. 3 of the Public Works Act, it is only the Lieutenant-Governor in Council to whom power to enter into such a contract as that before them is given. The character of any constitution which follows, as that of British Columbia does, the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament, that is to say, should not act individually, but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute. It follows that in the present case, no such contract could have been made, unless s. 3 authorized it. If authority be wanted for this proposition, it will be found in *Churchward* v. *The Queen* (1) and in the decision of this Board in *Commercial Cable Co.* v. *Government of Newfoundland.* (2) The vital preliminary question is, therefore, one of fact; was an order or resolution passed by the Lieutenant-Governor in Council authorizing the contract?

It was contended before their Lordships that it ought to be presumed that an Order in Council had been passed, so as to satisfy the provisions of the statute. But it appears from the affidavit of the Deputy Provincial Secretary that all Orders in Council, made by the Lieutenant-Governor in Council, are recorded in his office, and that no such order authorizing the acquisition of the land in question is to be found. Moreover, all the learned judges in the Court of Appeal appear to have regarded no such order as having been made, and it does not appear that this was disputed before them. Under these circumstances, their Lordships must hold that no such order, nor any resolution amounting to it, existed, and it is accordingly not necessary to enter upon the point made as to the seal. If so, this ends the case. For the mere assent of the ministers of the day to the contract could not, as has already been pointed out, under a constitution, such as that of British Columbia, make the contract

---

(1) L. R. 1 Q. B. 173.

(2) [1916] 2 A. C. 610.

J. C.
1922

MACKAY
v.
ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

a legally binding one, and accordingly the basis on which the claim under the arbitration proceedings was rested, disappears.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the hearing before this Board. No costs appear to have been given in the Courts below, and it is therefore unnecessary to deal with these costs.

Solicitors for appellant: *Linklaters & Paines.*

Solicitors for respondents: *Gard, Lyell, Betenson & Davidson.*

[PRIVY COUNCIL.]

J. C.*
1922
March 3.

SEGUIN . . . . APPELLANT;

AND

BOYLE . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (Yukon Territory)—Mining—Placer Mining Rights—Hydraulic Mining Lease—Regulations of 1898, *No.* 3—*Yukon Placer Mining Act* (*R. S. Can.*, 1906, *c.* 64), *s.* 17.

By No. 3 of the Mining Regulations for the Yukon Territory approved in 1898 and subsequently amended, "no application for a lease for hydraulic mining purposes shall be entertained for any tract which includes within its boundaries any placer, quartz, or other mining claim. . . . ."

In 1900 the Crown granted a lease of a tract in the Territory, with the right to mine by hydraulic or other mining process. The lease provided that it should be "subject to the rights and claims, but to such rights and claims only, of all persons who may have acquired the same under regulations," also that it should be subject to the above-mentioned regulations of 1898 as fully as if they were set out. At the date of the lease there were within the boundaries two existing placer mining grants, but they lapsed in 1901 and 1902. In 1920 a person, unconnected with the lapsed claims, applied to the Mining Recorder for a grant of a placer mining claim in respect of the ground covered

---

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW, and LORD PHILLIMORE.

J. C.
1922
SEGUIN
v.
BOYLE.

by the lapsed claims. The lessee had been in continuous possession under the lease, and had performed the covenants therein contained :—

Held, that Regulation No. 3 above mentioned was merely directory, and that the application in 1920 was rightly refused for the reason that the land was "lawfully occupied for placer mining purposes" within the meaning of s. 17 of the Placer Mining Act (R. S. Can., 1906, c. 64).

Osborne v. *Morgan* (1888) 13 App. Cas. 227 followed.

Judgment of the Court of Appeal reversed.

APPEAL from a judgment of the Court of Appeal of British Columbia (March 1, 1921) affirming a judgment of the Territorial Court of the Yukon Territory.

The appellant was the Mining Recorder for the Dawson Mining District, Yukon Territory. In 1920 the respondent, purporting to act under s. 17 of the Placer Mining Act (R. S. Can. 1906, c. 64), staked out a mining claim within the tract comprised in a lease granted by the Crown in 1900, and applied to the appellant for a grant of the claim. The facts of the case, the terms of s. 17, of No. 3 of the Mining Regulations, 1898, and the relevant terms of the lease of 1900, appear from the judgment of the Judicial Committee.

The appellant refused the application, being of opinion that, having regard to the lease, the land was "lawfully occupied for placer mining purposes" within s. 17 above mentioned.

The respondent thereupon applied to the Territorial Court of the Yukon Territory for an order nisi for a writ of mandamus ordering the appellant to accept the above application. Macaulay J., who heard the case, ordered that a mandamus should issue. The learned judge was of opinion that having regard to No. 3 of the Mining Regulations of 1898 the ground covered by the application—namely, the sites of placer claims existing at the date of the lease and since lapsed—was excepted out of the lease of 1900.

The present appellant appealed to the Court of Appeal of British Columbia, which by a majority (Macdonald C.J.A., with Martin, Galliher and Eberts JJ.A.; McPhillips J.A. dissenting) affirmed the decision.

The majority of the Court were of opinion that the matter was governed by the decision of the Supreme Court of Canada in *Canadian Klondyke Mining Co.* v. *Smith.* (1) McPhillips J.A. considered that that case was distinguishable on the facts, and that the true effect of the lease of 1900 was that it was subject to the then existing mining claims, but that when they lapsed the lease operated over the entire area leased.

1922. Jan. 17, 27, 30. *Sir John Simon K.C.* and *Hon. Geoffrey Lawrence* for the appellant. The lease of 1900 covered the whole area to which it related, and gave the right to placer mining. The appellant therefore rightly held that the land was "lawfully occupied for placer mining purposes," and consequently within the lands which s. 17 of the Placer Mining Act (R. S. Can., 1906, c. 64) excludes from those in which the rights given by it may be exercised. The Regulations of 1898 are merely directory. No. 13 of those Regulations recognizes that a lease infringing the regulations is not invalid; the wide nature of the provisions of No. 3 indicates that it cannot invalidate a lease actually granted. Further, a lease infringing the regulation is not void, but merely voidable by the Crown: *Osborne* v. *Morgan.* (2) Even if the lease was originally voidable, the Crown after the placer claims had lapsed in 1902 could have granted the lease. The validity of the lease therefore cannot now be questioned, having regard to the principle of feeding the estoppel, and to the fact that on the faith of the lease the lessee has expended large sums in development. In any case mandamus does not lie, there being other appropriate remedies: *Reg.* v. *Registrar of Joint Stock Companies.* (3)

Wilfred Barton for the respondent. The application was in respect of ground covered by the two placer claims subsisting when the lease was granted. Hence by reason of Reg. No. 3, which by the terms of the lease is to form part of its provisions, the ground did not, and could not, pass under the lease. The effect of the grant of the original placer claims was to exclude them from the limits of the land demised: *Canadian Klondyke Mining Co.* v. *Smith.* (1) There was no evidence that the lessee ever occupied, for placer mining or any purpose, the two lots comprised in the lapsed grants and in the application. If they were in possession under an invalid or voidable lease, the lots were not "lawfully occupied." The objection to the proceeding by mandamus was not raised below. There was no other available remedy. The respondents could not have obtained a declaration: *Hartley* v. *Matson.* (2)

---

(1) (1912) Supreme Court of Canada. Unreported. The case is reported in the lower Courts at 16 Western L. R. 296 and 19 Western L. R. 1.

(2) 13 App. Cas. 227.

(3) (1888) 21 Q. B. D. 131.

Hon. Geoffrey Lawrence in reply. Even if the lease is void, the lessee was in possession by the consent of the Crown given by the letters which passed in 1900. If in possession by consent under a void lease they were entitled to a placer mining grant: *Clayton* v. *Blakey.* (3) There was no cross-examination to show that the possession under the lease did not extend to the lots in question.

March 3. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. This is an appeal from a judgment of the Court of Appeal of British Columbia. It was dated March 1, 1921, and it affirmed a judgment of the Territorial Court of the Yukon Territory (Macaulay J.) dated May 11, 1920, whereby it was ordered that a writ of mandamus should issue commanding the appellant, as Mining Recorder for the Dawson Mining District, to accept the application of the respondent in this appeal for "a grant of Creek Placer Mining Claim No. 3 on Crofton Gulch, in the said Dawson Mining District, Yukon Territory, and on payment of the proper fees in that behalf to issue to the said Anna Theresa Boyle a grant of said Creek Placer Mining Claim No. 3 on Crofton Gulch in accordance with the provisions of the Yukon Placer Mining Act." The Recorder had refused the application. The question of substance in this appeal is whether that refusal was right.

A further question—one of procedure—has also been argued—namely, whether a writ of mandamus as sought was a competent and correct mode of seeking relief.

---

(1) (1912) Can. S. C. Unreported.

(2) (1902) 32 Can. S. C. R. 644, 666.

(3) (1798) 8 T. R. 3; 2 Sm. L. C., 12th ed., p. 118.

The respondent purported to act under the Yukon Placer Mining Act (R. S. Can., 1906, c. 64). In the year 1920 she staked out a claim 500 feet long on a certain piece of ground which in fact comprised the area covered by two grants—No. 3 Crofton Gulch, 250 feet long, which had been issued to one Patten on February 17, 1899, and another grant of No. 4 Crofton Gulch, 250 feet long, which had been issued three days thereafter to one Putzy.

The history of the ground is important. The grant of the first portion issued to Patten in 1899 was duly renewed and was "kept in good standing" until February 17, 1902. The grant of the second portion to Putzy in 1899 was duly renewed and "kept in good standing" until February 20, 1901. On those respective dates, accordingly—namely, February 20, 1901, and February 17, 1902—the Putzy and Patten claims completely lapsed. On November 5, 1900, that is to say, during the standing of the two placer claims, which shortly after that date lapsed, a hydraulic lease was granted, after due procedure of the Government, to J. W. Boyle. The hydraulic lease included within its geographical bounds these claims, but was made subject to the rights of the holders of placer claimants. The effect of this lease with this reservation will be hereafter discussed. Until March 9, 1920, when the respondent's claim was put forward, the ground was possessed under the lease for a period of over eighteen years, that is to say, from the lapsing of the Patten and Putzy leases in 1902. It should further be explained that on March 10, 1902, application had been made by W. Shaw for a grant of Claim No. 3, and on May 3, 1913, a similar application by C. W. MacPherson had been made. But both of these applications were refused on the same ground—namely, that the right to the block of ground had reverted to the holder of the hydraulic lease.

When in March, 1920, the claim by the respondent was put forward, the appellant's action as Mining Recorder for the Dawson Mining District is stated in his own words in his

J. C.
1922
SEGUIN
v.
BOYLE.

affidavit thus: "I refused to issue the said grant for the reason that the said Crofton Gulch is within the limits of hydraulic lease No. 18, and was for that reason on land lawfully occupied for placer mining purposes, as described in s. 17 of the Yukon Placer Mining Act." Were this action and reason correct? After very full consideration of the arguments and of the judgment of the learned judges in the Court below, the Board is of opinion that they were.

It is expedient now to consider the nature and provisions of the hydraulic lease. As mentioned, it was granted on November 5, 1900, in favour of one Joseph Whiteside Boyle. (On June 26, 1913, it was assigned to the Canadian Klondyke Company, Ld.) The preamble to the lease narrates the application to the Minister "for the exclusive right and privilege of taking and extracting by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon that certain tract of lands . . . . particularly mentioned and described." The preamble further narrates that it is desirable to introduce hydraulic mining into the Yukon Territory. It recognizes that large expenditure might be necessary, and in view thereof that the lessee is "entitled to have secured to him, his executors, administrators and assigns, the exclusive right of extracting and taking for his own use and benefit, all royal or precious metals from, in, under or upon the said tract of lands." It is important to add with regard to the preamble that the lease of these particular lands was expressly authorized by an order of the Governor-General in Council of December 3, 1898.

The operative grant and demise is in these terms: "Now this indenture witnesseth that in pursuance of the premises and in consideration of and subject to the rent, covenants, provisions, exceptions, restrictions and conditions hereinafter reserved and contained, and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other mining process, all royal or precious metals, or minerals, from, in, under or upon the tract of lands hereby demised and leased with regard to which the said rights and privileges are hereby granted."

There follow a description of the tract in some detail and a reference to a plan or survey thereof. The rental payable was $1008 per annum, and in addition to the rent a certain royalty upon the output. Furthermore, the lessee becomes obliged, under pain of complete forfeiture of the lease, to have sufficient hydraulic or other machinery in operation on the demised premises within one year, and to expend during every year of the term the sum of $6000 "in mining operations or in, about or upon the mining rights and privileges."

There are two broad, admitted, facts in the case: In the first place, that the rent has been regularly paid, and, in the second place, that the obligation as to annual expenditure in operations has been amply fulfilled. It is not, in short, denied that the lessee and his assigns fully entered into and have continued in possession of the lands demised, a possession which by the terms of the contract was to be exclusive. A third admission, however, is of equally great importance, and it is that geographically these lands do embrace the tract of 500 yards claimed by the respondent; and the case, therefore, is one in which the respondent, in face of an exclusive title in favour of the Klondyke company, sets up, not a mere competing, but an overriding right as a placer miner.

She bases the application upon the important foundation of placer-claimants' rights—namely, s. 17 of the Yukon Placer Mining Act (R. S. Can., 1906, c. 64). That section is in the following terms: "Any person over, but not under, eighteen years of age may enter for mining purposes, locate, prospect and mine for gold and other precious minerals or stones upon any lands in the Territory, whether vested in the Crown or otherwise, except lands within the boundaries of a city, town or village, as defined by any ordinance of the Commissioner in Council, or lands occupied by a building or within the curtilage of a dwelling-house, or lawfully occupied for placer mining purposes, or which form part of an Indian Reserve."

In addition to the admission of the geographical inclusion of the tract claimed by the respondent within the land granted to Boyle, it is not denied that that lease, although named a hydraulic lease, is also a lease for other mining purposes, and that in fact the Klondyke company, Boyle's successor, have placer mining rights upon all the land which their lease contains.

The consequences in ejectment or otherwise so as to enable the affirmation of the respondent's right to become effective are sufficiently obvious, and, other things being equal, it lies upon the respondent, who presents a competitive title later in date by twenty years than the lease, to establish her right.

In discharging this burden it is, of course, clear, however, that it is within the rights of the respondent to challenge the title of the Klondyke company and to examine the Boyle lease so as to verify that challenge. But in connection with this topic it has to be kept prominently in view that the respondent has shrunk from attacking and expressly declines to attack the lease as such. The argument, however, is that although the lease may be valid, yet it proves by its terms that the block which the respondent now claims was excluded from its ambit. Reason "c" in the case for the respondent before the Board is explicit. It is in the following terms: "The respondent is not attacking the Hydraulic Mining Lease No. 18 as such, but she disputes the appellant's ruling to the effect that the Patten and Putzy placer mining areas fell into that lease upon the lapsing of those placer mining claims." The case is accordingly in a somewhat singular position. It is not asked that the lease as a whole be declared void, nor does the respondent maintain its voidability as such.

It may well be that the respondent is content simply to demand that this lease does not include and cannot by law include the Patten and Putzy tract. Upon examination, however, of the argument upon which this demand is based, it becomes plain that that argument involves putting upon the lease and regulations, taken together, a construction under which the reference by the former to the latter would destroy the lease altogether, the lease would by its own terms have written away its own validity. This point is of importance to the Province, and has received the careful examination of the Board.

The respondent particularly refers to the third clause of the lease and also to the provisos contained in clause 18 thereof. The third clause is as follows: "3. That the said lease or demise shall be subject to the rights or claims, but to such rights or claims only, of all persons who may have acquired the same under the Regulations of any Order of the Governor-General in Council up to the date of these presents." It is to be noted that this is not a reservation from the lease of any particular land as such, and it would be inapt for such a purpose. On the contrary, it is an implied affirmance that the land itself is in fact within the ambit of the lease, but that that land, so included, is nevertheless subject to certain rights or claims. In the second place, the nature of these rights and claims was, as was most natural, determined as at the date of the lease, as then belonging to persons who had already acquired the same under the regulations, and prior to the lease. Those persons—and the clause says those persons only—are referred to in the exception. In short, the lease is in accordance with the policy of the statutes, that is to say, it is a lease guaranteeing non-disturbance of existing claimants who are in point of fact conforming with the terms of their holding by accepting the yearly renewals thereof demanded by law, and by working on their claims. If, however, the persons then working placer claims cease to work them, and if renewals are neither granted nor asked for, then those rights and claims lapse and lapse entirely. Those persons no longer have any right as against the lessee; and the exception to which the lease was made subject has disappeared.

Had there been no lease the land as lapsed land would have reverted to the Crown. But there being a lease, the land as lapsed land as to which the exception of rights has passed off, falls under the lease. It does not appear to their

Lordships to be reasonable to construe the exception in any broader sense. It certainly did not, as will be noted afterwards by a reference to a correspondence which took place at the time, appear to the Government or officials of the day that there was any exception of the lands themselves from the scope of the lease granted in 1900, and it does not so appear to the Board. The other view would imply that there was, so to speak, by the mere incident of certain lands being, at the date of the lease, worked as placer claims, an enfranchisement in perpetuity of such lands and a permanent exclusion thereof from the lease which geographically covered them.

The policy of the statutes and regulations was manifestly, on the one hand, to promote the development of the mineral resources of the Province, and, on the other, to prevent overlapping of rights and the confusion that would thereby ensue. While it is plain that the view last mentioned would be out of accord with this policy, it is sufficient to say that, in their Lordships' opinion, the view is unsound as a construction of Reg. No. 3.

A more difficult question, however, arises in the construction of the regulations themselves. The important provision of the lease is the last part of clause 18, which is in these terms: "Provided also, that this demise is subject to all other regulations contained and set forth in the said Order in Council of the third day of December, A.D. 1898, as amended by subsequent Orders in Council as fully and effectually to all intents and purposes as if they were set forth in these presents."

No. 3 of the Regulations of December 3, 1898, is very important. It is in these terms: "3. To any person who files an application in the Department of the Interior at Ottawa for a location previously prospected by him, or his authorized agent at the time the location was prospected, a lease will be issued provided he is the first qualified applicant therefor. Before the issue of any such lease there shall be filed in the Department of the Interior at Ottawa a report from the Gold Commissioner to the effect that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date of the application the ground included in the location, and that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining. No application for a lease for hydraulic mining purposes, however, shall be entertained *for any tract which includes within its boundaries any placer, quartz or other mining claim* acquired under the regulations in that behalf, *or in the immediate vicinity of which placer, quartz or other mining claims have been discovered and are being profitably operated,* and also that the Gold Commissioner shall, in addition to furnishing the reports above referred to, be required to furnish a certificate that the location applied for does not contain any such placer, quartz or other mining claim, nor have any such claims been granted in the immediate vicinity of such location." . . . . (The words are italicized in order to be noted.)

In an able argument for the respondent Mr. Barton maintained that this clause was a definite pronouncement incorporated in the lease to the effect that no application for a lease in the year 1900 by Boyle should or could be entertained in respect of any tract which included within its boundaries the land at its date occupied by Patten and Putzy. The argument, logically considered, would destroy the lease altogether. For the contention cannot be confined to these two plots, seeing that the scope of the proviso is that the whole tract of land under lease must be included: and the argument would mean that no lease of such a tract of land could be entertained or could be granted if de facto any portion of the land embraced in it was, at the particular moment of time when the lease was granted, occupied by a placer miner with a claim in good standing. The result as mentioned would amount to a declaration of the incompetency of the Crown ever to bind itself by granting any lease which included any plot however small, and however transitorily occupied for placer mining at its date. In the view of the Board the regulations cannot be so construed.

Their Lordships have no hesitation in treating these regulations as primarily directory to all parties, and particularly to the officials of the Government in carrying out the mining policy of the Province. Several of the regulations—they need not be entered upon in detail—are plainly of that character, and among them is Reg. No. 18.

Furthermore, attention should be paid to Reg. No. 13, which makes careful provision for the action of the Gold Commissioner and the giving of notice to all persons concerned by any right or semblance of right. It is in these terms: "When it is decided to hold any ground for the purpose of the same being included in locations under these regulations the Gold Commissioner shall cause a notice to that effect to be posted in a prominent and conspicuous place in the office of the Mining Recorder of the district in which the ground is situate: and after the posting of such notice no occupation or right under the regulations governing placer mining shall be recognized on any ground so held; but any bona fide occupation or right acquired under such regulations prior to the posting of such notice shall be recognized and the Gold Commissioner shall make provision for the miner who has acquired such occupation or right being protected in the same." This is a very plain declaration that the same policy, upon the one hand of encouraging development and upon the other of preventing overlapping, is to be administratively carried out with consideration for the interests of possessors for the time being. These, if any, are concerned at the time, and, their rights being adjusted, the lease goes forward.

Upon the whole, their Lordships have come to the conclusion that clause 3 of the lease itself is the governing and over-riding provision, and that clause 18 does not have the effect of turning a directory section of the regulations into a section restricting the ambit of the lease. The exception governed by clause 3 is of "such rights or claims only of all persons who may have acquired the same under the regulations,"—pointing, as has been said, to the protection of individual persons and of existing rights and claims only, and to those sets of persons who had actually anterior to the date of the lease acquired particular blocks. Interpreted in the concrete, that meant Patten and Putzy; it did not mean that the lands themselves (their right in and occupancy of which had lapsed) were excluded from the lease. If it were so, the result would be peculiar. The lands would presumably revert to the Crown in such a manner as to lay it open for placer claimants who might in future years repeat the former experiment and also disappear. Fluctuating series of invaders would arrive asserting placer claims upon blocks of land geographically under the lease. This would be a mere confusion.

Reference has been made to the disclaimer of attack upon the lease as a whole, but in their Lordships' opinion the argument logically stated can result in nothing less than such an attack. And it is now necessary to examine whether any such right of challenge lay in the respondent. This lease, according to the argument, was void, or was voidable, and voidable at the instance of the newly arrived claimant, the respondent, in the year 1920. In the opinion of the Board the respondent has no such right. But their Lordships need not discuss the principle in any detail, because in truth the point has been settled with complete clearness in the case of *Osborne* v. *Morgan*. (1)

That was a case occurring under the Queensland Goldfields Act, 1874, and regulations made thereunder, and the action was at the instance of holders of "miners' right," its object being to set aside mining leases granted to the defendants. There were two grounds of action: first, that the leases had been granted contrary to a provision of the Act of Parliament —namely, within two years from the proclamation of the goldfield; and secondly, that the applicants for the leases had not complied with the regulations in force. As will be seen, the circumstances were not unlike those of the present case, and they raised precisely the same questions. In the first place, is the lease void or is it merely voidable? And did a title to challenge rest in the holder, in the Australian case, of a miner's licence; and in the present case does it rest in a placer claimant? Upon the first question, the opinion of the Board, as expressed by Lord Watson, was clear. Said he: "The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere licence, which carries no legal or equitable interest in the soil. An ex facie regular lease, followed by possession, and impeachable only upon such extrinsic grounds as are alleged in the appellant's declaration, is, as between the parties to it, not void but voidable; and, the lessees being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether they shall be permitted to do so or not."

---

(1) 13 App. Cas. 227.

As in the Australian case, so here, the lessor is the Crown acting through the Government of the day and its officers. This pronouncement seems to conclude both questions. It is in the first place clear that the Klondyke company's lease was not void.

When, however, a lease is merely voidable, then the principle of law to be applied is that the title of the person seeking to avoid it is not a general one in the public, and such a title is not in fact extended to any one except to (1.) those who are in contract relations; or (2.) those who have, by convention between those who are so, a title to challenge; or (3.) those upon whom by statute a right of challenge is conferred. The two first examples do not occur in the present case; but it may be added upon the question of voidability that the present would be a singularly clear case in which such voidability would not even be open to the Crown itself. Res non sunt integrae. It seems perfectly plain that, the lease not being itself void, but voidable on just cause shown by the lessor, any attempt by the Crown brought to declare it void, and brought twenty years after possession had been taken, after payment of rent and royalties had been made, and after great expenditure upon the subject of the lease by the lessee, such an attempt could not be successfully maintained.

It further turns out that at the time of the lease a fair and frank correspondence took place between the Government itself and the lessee, Mr. Boyle. They negotiated upon this very subject of difficulty—namely, the occupancy at that time of certain plots of the leased ground by working placer miners. Mr. McGiverin on November 22, 1900, wrote to the Minister of the Interior, Ottawa, on behalf of the lessee as follows : "Regarding any placer mining claims existing within the limits of the area leased for hydraulic mining purposes, on record in the Timber and Mines Branch of the Interior Department as Lease No. 18 File No. 55,466, I beg to state that while the intention is clearly apparent that when abandoned these claims are to revert to and become a part of the leasehold, it appears to be necessary that the lessee should have a letter from your Department to this effect. Will you kindly look into this matter at your earliest convenience and have a letter issued to me covering this point." The Secretary of the Department replied on December 12, 1900 : "I beg to acknowledge the receipt of your letter of the 22nd ultimo addressed to the Minister of the Interior, with respect to Hydraulic Mining Lease No. 18, issued in favour of Mr. Joseph Boyle, of Dawson, of a tract of land situated on the Klondyke River, in the Yukon Territory, and in reply to inform you that all placer mining claims within the boundaries of the above leasehold for which entry was in force at the date of the lease, but which may be abandoned or forfeited for any cause, will at any time during the currency of the lease revert to the lessee."

It is manifest that in face of such correspondence a challenge by the Crown would be in bad faith and could not succeed, and their Lordships are not surprised to find that the Government of the Province takes up no such attitude and is in no way concerned with the challenge made by the respondent. It would be a curious circumstance if, the lessee having thus against the Crown an indefeasible right, his right could nevertheless be challenged by another party who was no party to the contract but a late arrival on the ground, and the only result of whose challenge would be, when given ultimate effect, to accomplish that dispossession of the appellant which even the Crown itself could not legally achieve. It is, moreover, very clear that no such result and no material step leading to it should be taken by a Court unless the contracting parties are convened before it; and in the present case a mandamus is asked and the case has proceeded to judgment granting it without either the lessee, the Canadian Klondyke Company, or the lessor, the Crown, having been made parties to these proceedings. It is in any view plain to the Board that no final judgment should have been reached without all parties having been called.

This appears to follow, and very properly so, from the decision in *Osborne* v. *Morgan* (1) already referred to; and another passage clearly elucidating the point, from the judgment read by Lord Watson, may be here given. It is as follows: " But the appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the Crown. They concede that no decree which they can obtain in this action could operate as res judicata between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular results. On that supposition, the lessees may have so conducted themselves that they cannot withdraw from their contract obligations: and the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease at any time during its currency. They may delay their challenge until the lessees have, on the faith of the lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, without the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right." (2)

In conclusion, and upon the merits of the contention as to the application of the regulations to the lease, the opinion of the Board is definite that the proviso to clause 18 of the lease—that the demise is subject to the regulations—ex necessitate incorporates only such regulations as are consistent with the existence of the lease itself and applicable thereto. It is impossible to conclude that when regulations are imported by reference into the lease itself they should be imported for the purpose and with the result—the parties knowing what they did, as is proved by the correspondence cited—of destroying altogether the demise and of rendering it void. Upon the construction contended for, this lease thus contained on its face a declaration of its own non-validity. This is necessarily the result of the argument submitted, and it need hardly be observed that a suicidal interpretation of the sort must be the last resort of construction. A fortiori—if in the circumstances an a fortiori is possible—such a construction should not be adopted at the instance of an applicant who was no party to the contract in issue.

---

(1) 13 App. Cas. 227.

(2) 13 App. Cas. 227, 235.

Their Lordships have felt constrained to enter fully into a discussion of this fundamental question on account of the difficulty in which it is manifest the learned judges of the Court of British Columbia felt themselves to be placed by reason of the judgment in *Canadian Klondyke Mining Co.* v. *Smith.* (1) The judgments in the Supreme Court on appeal do not appear to have been reported officially, but the parties have been good enough to incorporate in the record in the present case a full report thereof.

On a perusal of the case of *Canadian Klondyke Mining Co.* v. *Smith* it appears prima facie peculiar that it should have been reckoned as a precedent of authoritative bearing upon the subject of the present appeal. The difference on the facts between the two cases is outstanding. The present is a case where it is claimed that the respondent has the right to set up a mining claim on ground which is unoccupied land, and to set it up by a proceeding twenty years in date subsequent to the lease which geographically embraces it and upon which the appellant takes his stand as a title. In *Smith's Case* the respondent's claim was located on November 2, 1899, and was recorded on November 3, and a record was issued therefor as provided by the regulations for the disposal of quartz mining claims. It was an admission in the stated case that the respondent's claim "is still, by virtue of such compliance with the requirements of the Act and Regulations, on foot." It was not until more than a year thereafter—namely, November 5, 1900—that a hydraulic lease (the same lease as is in issue in the present case) was made by the Crown to Boyle. The analogy between that case and the present accordingly fails at the outset. Boyle as lessee was preferring against the quartz miner a right under a lease subsequent to the miner's record. This was clearly an illegal attempt to dispossess one in actual occupancy. As Idington J. says: "The actual operations conceivable under each of these alleged rights would seem to me so clearly conflicting that they could not advantageously be operated together on the same land, and I do not think ever were intended to be so. The two claims are mutually destructive of each other. . . . . The respondent's rights were acquired earlier, and therefore in such view must stand and appellant's contention fail." The other learned judges accept the same position, and the answer to the case as a precedent ruling the present is simply that the lessee's right was put forward for the purpose of dispossession of a quartz miner who was, to use the familiar language, actually "in full standing" at the time when the action was brought, and had been so at the date of the lease.

---

(1) Sup. Ct. of Can., 1912. Unreported. Reported in lower Courts at 16 Western L. R. 196 and 19 Western L. R. 1.

But in the course of these judgments certain expressions were used which have undoubtedly embarrassed the judges in the present case, because they lend colour to the idea that in addition to protecting the right of a prior placer holder in full standing the actual land of the claim itself becomes for ever excluded from the possible ambit of the lease. It may quite possibly be supposed that it did not cross the minds of the learned judges in the *Smith Case* that it would ever be maintained as here, that in the case of land the claims upon which had lapsed, although they were in standing at the date of a lease, such land became itself enfranchised, excluded from the lease, and open to be left waste or to be claimed for by others as placer claimants in the course of future years. Accordingly, the learned judges, dealing with a case in full standing and with nothing else, have used language of a breadth which is now cited as a precedent in the present case. Their Lordships note with satisfaction and with agreement that Anglin J. inclines to hold "that the lease was issued subject to these regulations rather than that the Minister acted in contravention of them." And the same holds of that part of the judgment of Duff J. which says: "The last provision of clause 18 of the lease in question introduces the regulation of August 25, 1900, in so far at least as the application of the regulation is not inconsistent with the validity of the lease itself."

Nor do they differ from the concluding passage in the judgment of Idington J., dealing with the regulations, to the effect that they form a code "which may and must get a rational interpretation and one that will, however the words looking to futurity may be capable of being read, be so read that everybody's rights will if possible be preserved, even including those of the appellant" (that is, a claimant in full standing and occupancy) "if and so far as founded on these Regulations."

When, however, the learned judges express their view, as does Anglin J., "that by the very terms of their contract they should therefore be deemed to have excluded from the demised premises the territory covered by the quartz mining claim of the plaintiff"; and when Duff J. construes the effect of the regulation to be "to prohibit the leasing or hydraulic mining of any area embraced within the boundaries of a quartz claim; and the incorporation of the regulation in the lease in question consequently excluded all such areas from the limits of the land demised," their Lordships are of opinion that those views were not necessary for the decision of the case and were as stated unsound. As mentioned, the expressions were used in a case affecting and affecting only land under quartz miners "in full standing." They, however, are apparently capable of construction as applicable to land itself and even to land which was worked on by a claimant under a claim which has entirely lapsed. But the policy of these regulations would be impeded, in so far as development of the colonial mining industry is concerned, by such a construction, and their Lordships do not see their way to adopt it. In these circumstances their Lordships agree with the conclusion come to by the learned judge McPhillips J.A. rather than with that arrived at by the other learned judges who deferred to the dicta in the *Smith Case* already dealt with.

The merits of the application having been fully investigated and determined, no occasion accordingly arises for dealing with the argument upon procedure, including the question of the competency of a writ of mandamus.

Their Lordships will humbly advise His Majesty that the appeal should be sustained, that the judgments of the Court below should be recalled, and that the application of the respondent should be refused and the appellant found entitled to costs here and in the Courts below.

Solicitors for appellant: *Julius, Edwards & Julius.*
Solicitors for respondent: *White & Leonard.*

[PRIVY COUNCIL.]

J. C.*
1922
March 7.

L. OPPENHEIM AND COMPANY . . APPELLANTS;

AND

MAHOMED HANEEF (SINCE DECEASED) . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Arbitration—Award—Submission to Arbitration in England—Suit in India on Award—Defence of Irregularity in Arbitration—Judgment by Default in England—Suing on Judgment in India—Code of Civil Procedure (*Act V. of* 1908), *s.* 13—*Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 11.

In a suit in India upon an award made upon a submission to arbitration in England, irregularity or misconduct in arriving at the award is not a defence; on those grounds the award can be set aside only on motion under the (English) Arbitration Act, 1889, made within the time limited by Order LXIV., r. 14, of the Rules of the Supreme Court (England).

Thorburn v. *Barnes* (1867) L. R. 2 C. P. 384 approved and followed.

A judgment on the award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits" within s. 13 of the Code of Civil Procedure (Act V. of 1908).

Keymer v. *Visvanatham Reddi* (1916) L. R. 44 I. A. 6 followed.

Quaere, whether where a judgment is obtained in England the award is merged in it, a contention not raised in the present case.

Judgment of the High Court on appeal reversed.

APPEAL (No. 31 of 1920) from a judgment and decree (November 6, 1918) of the High Court in its appellate jurisdiction, reversing a decree of the Court in its original civil jurisdiction.

The suit which gave rise to the appeal was brought in the High Court at Madras by the appellants, merchants carrying on business in London, against the respondent, a merchant at Madras. Among other causes of action the appellants sued upon an award in their favour made under a submission to "arbitration in London in the usual manner" contained in a contract of sale made between the parties. To that cause of action the respondent pleaded that the award was not binding upon him, as no notice had been given him by the arbitrator that he was proceeding to arbitrate. The facts are more fully stated in the judgment of the Judicial Committee.

---

* *Present:* VISCOUNT CAVE, LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, and MR. AMEER ALI.

The trial judge (Coutts Trotter J.) made a decree for the amount awarded, holding that under the submission the arbitration was to be governed by the law applicable to arbitrations in England, and that upon the authority of *Thorburn* v. *Barnes* (1) the defence could not be raised in the suit.

On appeal the decision was reversed by Sir John Wallis C.J. and Napier J. The learned Chief Justice (with whose judgment Napier J. agreed) was of opinion that the rule in England that misconduct in making an award was not a good plea to an action on the award did not apply in India, since there there was no distinction between law and equity, and any ground for equitable relief could be raised as a defence. He referred to three decisions of the Courts in India mentioned in the argument for the appellants, and concluded by saying that the English doctrine on which the above rule rested was of a highly technical character and could not, in his opinion, be imported into India under the terms of justice, equity or good conscience.

1922. Feb. 17. *De Gruyther K.C.* and *Harold Morris K.C.* for the appellants. The alleged irregularity was not a defence to the suit upon the award. The contract provided for "arbitration in London in the usual manner." It was clearly the intention of the parties that their rights under that part of the contract should be governed by the law prevailing in England, and consequently that law applied: *Hamlyn & Co.* v. *Talisker Distillery.* (2) It is well established in English law that in an action upon an award, irregularity or misconduct in the arbitration proceedings is not a defence: *Thorburn* v. *Barnes.* (1) The award can be set aside if those grounds are established upon motion under s. 11 of the Arbitration Act, 1889; that was the only course available in this case if the validity of the award was to be attacked. *Bindessuri Pershad Singh* v. *Jankee Pershad Singh* (3);

---

(1) L. R. 2 C. P. 384.
(2) [1894] A. C. 202, 207.
(3) (1889) I. L. R. 16 C. 482.

Surjan Raot v. *Bhikari Raot* (1); and *Ghellabhai Atmaram* v. *Nandubai* (2) were cases as to arbitrations in India, and do not apply where the parties have by their contract submitted to arbitration in England. The appellate Court in the present cases thought that the English rule was of a technical character, and not within justice, equity, or good conscience. It is, however, submitted that the parties having, by the law which they have agreed is to apply, a good remedy, are fairly precluded from pursuing a different remedy. [Reference was also made to the Code of Civil Procedure, 1882, ss. 520, 521, 525; and the Code of Civil Procedure, 1908, clauses 20, 21.]

The respondent's representatives did not appear.

March 7. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from a decree of the High Court of Judicature at Madras, in the exercise of its appellate jurisdiction, allowing an appeal from a decree made by Coutts Trotter J. in the exercise of the ordinary original civil jurisdiction of the same Court.

The appellants are merchants carrying on business in London, and the orginal respondent (who has died during the pendency of this appeal and is represented by the present respondents) was a merchant carrying on business in Madras.

By a contract in writing made in London and dated October 23, 1913, the appellants bought from the respondent 20,000 tanned Madras sheepskins of a specified quality to be shipped to the appellants in London. The contract contained the following clause: "Any differences arising out of this contract, failing amicable adjustment, to be submitted to arbitration in London in the usual manner, and the award of such arbitration to be final and binding on both buyer and seller."

Certain skins were shipped to London, and the appellants paid to the respondent 1495*l.* 15*s.* 4*d.* in respect of those skins. When the skins arrived in London, the appellants alleged that they were of inferior quality and refused to accept delivery. They were ultimately sold, with the consent of

---

(1) (1893) I. L. R. 21 C. 213.

(2) (1895) I. L. R. 20 B. 238.

J. C.
1922
OPPENHEIM & Co.
v.
MAHOMED HANEEF.

the respondent, at the price of 1242*l.* 10*s.*, thus leaving a deficiency of 253*l.* 5*s.* 4*d.*, which the appellants demanded from the respondent and which the respondent refused to pay. Thereupon the appellants, in pursuance of the arbitration clause contained in the contract and of the English Arbitration Act, appointed Mr. R. H. Pringle as arbitrator on their behalf in the difference which had arisen, and caused the respondent to be served at Madras with a notice, dated February 3, 1916, whereby they informed him of the appointment of Mr. Pringle and required him, within seven days from the service of the notice, to name to the appellants or their agents in Madras an arbitrator to act on their behalf in London in the matter of the difference which had arisen, the notice stating that otherwise the difference would stand referred to Mr. Pringle alone as sole arbitrator. The respondent refused to appoint an arbitrator to act on his behalf or to take part in the arbitration; and thereupon Mr. Pringle, at the request of the appellants, proceeded with the arbitration. He gave no opportunity to either party to appear and give evidence before him, but having read the contract and correspondence and inspected the skins, he made his award in writing dated July 11, 1916, and thereby awarded that the respondent should pay to the appellants the sum of 258*l.* 5*s.* 9*d.*, with interest and costs.

On July 15, 1916, the appellants brought an action in the King's Bench Division of the High Court of Justice in England for the amount payable under the award, and, the writ of summons having been served by leave upon the respondent at Madras and no appearance having been entered, the appellants, on November 28, 1916, recovered judgment against the respondent for the sum of 286*l.* 2*s.* 9*d.*, being the amount of the award with some interest and costs.

The appellants then brought the suit out of which this appeal arises against the respondent in the High Court of Judicature at Madras, claiming the sum of 286*l.* 2*s.* 9*d.* due under the judgment of the King's Bench Division, or in the alternative 263*l.* 10*s.* 9*d.*, being the amount of the award and costs, with interest, or as a further alternative 253*l.* 5*s.* 4*d.*,

J. C.
1922
OPPENHEIM & Co.
v.
MAHOMED HANEEF.

being the loss on the contract. The respondent pleaded (among other pleas which are not now material) that the judgment of the High Court of Justice in London was not binding upon him, as it was not given on the merits, that the claim under the contract was barred by limitation, and as to the award, that it was not binding upon him, as no notice was given to him by the arbitrator that he was proceeding to arbitrate.

The suit was heard by Coutts Trotter J., who held that, having regard to the decision of this Board in *Keymer* v. *Visvanatham Reddi* (1), the action upon the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried upon its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to. With regard to the award, the learned judge in a lucid judgment held that the plea of want of notice could not be raised by defence in the suit. After observing that the grievance of the respondent was more imaginary than real, the award having been made by a commercial man who took the commercial documents with which he was familiar and saw the goods and gave his opinion on the spot, he added that if the objection could have been raised in the proceedings he would have felt constrained to give effect to it. But he referred to *Thorburn* v. *Barnes* (2) as a complete authority for the proposition that according to the English law any objection relating to an irregularity in bringing an award into existence must be taken by motion under the Arbitration Act, 1889, to set side or remit the award, and if not so taken could not be raised by way of defence to an action on the award. He therefore held that the defence that the award was tainted with irregularity by the fact that the respondent had not had an opportunity of being present at the arbitration, was not open to him in the suit. An application having been made by counsel for the respondent to treat the written statement as an application to the Court at Madras to set aside the award, the learned judge held that he had no jurisdiction to entertain such an

(1) L. R. 44 I. A. 6.

(2) L. R. 2 C. P. 384.

application, adding: "How a judge in Madras is supposed to have jurisdiction to upset an award made by an arbitrator in London passes my comprehension, and it is perfectly clear that the Court which is given jurisdiction by the English Act is the English Court." He added that even if he had had jurisdiction he would have declined to exercise it.

Against this judgment an appeal was brought and was allowed by the Appellate Division, the learned judges of that Division holding that the rule in *Thorburn* v. *Barnes* (1) did not apply in India. Thereupon the present appeal was brought.

In their Lordships' opinion Coutts Trotter J. came to the right decision and this appeal should succeed. The contract of October 23, 1913, was made and was to be performed in England; and the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure. Under that law, by which both parties agreed to be bound, any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator must be taken by motion to set aside or remit the award, and if not so taken cannot be pleaded in answer to an action on the award. In the present case no such motion was made within the time limited by Order LXIV., r. 14, of the Rules of the Supreme Court, England, or at all, and accordingly the award became as fully binding on both parties as if it had been incorporated in the contract. No doubt any defence going to the root of the award—for instance, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit; but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound.

On this view of the case the Indian law as to arbitration is irrelevant, and their Lordships accordingly express no opinion on the question whether if the arbitration had taken place in India the defence on the ground of irregularity could have been pleaded. It is plain that the Indian Court could not set aside an English award on that ground.

---

(1) L. R. 2 C. P. 384.

J. C.
1922
OPPENHEIM & Co. v. MAHOMED HANEEF.

In order to prevent misconception it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree of Coutts Trotter J. should be restored, the respondents to pay the costs in both Courts in India and the costs of this appeal.

Solicitors for appellants: *Morris, Veasey & Co.*

[PRIVY COUNCIL.]

J. C.*
1922
March 9.

GOPALA CHETTY (SINCE DECEASED) AND ANOTHER . . . . APPELLANTS;

AND

VIJAYARAGHAVACHARIAR . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Partnership—Limitation—Dissolution—Asset received by Partners—Right to sue for Share—Taking Accounts—Indian Limitation Act (XI. of 1908), *Sch. I., art.* 106—*Indian Contract Act (IX. of* 1872), *s.* 265.

If a partnership has been dissolved but no account has been taken, the proper remedy of a partner in respect of an asset received by another partner is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it.

Merwanji Hormusji v. *Rustomji Burjorji* (1882) I. L. R. 6 B. 628; *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1904) I. L. R. 28 M. 344, and decisions following them, disapproved.

Observations in *Knox* v. *Gye* (1872) L. R. 5 H. L. 656 explained.

Judgment of the High Court reversed.

APPEAL (No. 128 of 1920) from a judgment and decree (November 19, 1918) of the High Court in its appellate jurisdiction, affirming an interim decree of that Court in its original civil jurisdiction.

* *Present:* VISCOUNT HALDANE, LORD PHILLIMORE, and MR. AMEER ALI.

J. C.
1922
Gopala Chetty
v.
Vijayaraghavachariar.

The respondent as plaintiff in a former suit against the appellants had claimed an account of a partnership which had subsisted between them. By a decree made by a judge of the High Court on February 25, 1915, that suit was dismissed on the ground that the partnership had been dissolved in April, 1910, and that consequently the suit was barred by the Indian Limitation Act (XI. of 1908), Sch. I., art. 106. On April 30, 1915, the respondent brought the present suit in which he alleged that certain specific sums had been received by the appellants on the partnership account, and claimed his partnership share. The items were set out in the schedule to the plaint, and were stated to have been received at various dates all of which were before the date of the decree, and the majority before the previous suit was instituted.

The trial judge, Kumaraswami Sastriar J., made an interim decree declaring that the plaintiff was entitled to a fourth share in such items contained in the schedule as had been collected by the defendants, with interest, and referring the suit to chambers to take an account, with a direction that if on taking a general account of the dealings of the partnership any sum was due by the plaintiff it should be set off against his share of the sums so received.

An appeal was heard by Sir John Wallis C.J. and Napier J. and the decree of the trial judge was affirmed, subject to a slight variation as to the interest to be recovered. The learned judges said that they were not prepared to go behind the previous decisions of the Madras High Court hereinafter mentioned. They said the decisions would appear to proceed upon the view that the receipt of assets by a former partner after a dissolution gives rise to a fresh cause of action; otherwise it would be quite impossible to distinguish *Knox* v. *Gye*. (1)

1922. Jan. 31. *Sir George Lowndes K.C.* and *A. M. Talbot* for the surviving appellant.

Parikh for the respondent.

The arguments appear from a report in L. R. 49 I. A. 181.

---

(1) L. R. 5 H. L. 656.

J. C.
1922
Gopala Chetty
v.
Vijayaraghavachariar.

March 9. The judgment of their Lordships was delivered by Lord Phillimore. About the year 1908 a partnership was formed between Narasimhachariar, the respondent Vijayaraghavachariar, the appellant Gopala now deceased and the appellant Ethirajulu, who for the purposes of this appeal also represents the first appellant. Narasimhachariar having died in 1911, a suit was filed on November 15, 1913, in the High Court at Madras by his adopted son against the respondent and the two appellants, praying for partnership accounts, and payment to him of his adopted father's share. The plaintiff in this suit was, in some manner not now important to consider, settled with, and retired from the suit, and by an order of the High Court the respondent was transposed from his position as defendant and became plaintiff, continuing the suit against the other defendants, the present appellants.

The suit came on for hearing before a judge of the High Court on February 26, 1915, when it was found that the partnership had been dissolved before the death of Narasimhachariar—namely, in April, 1910—and that therefore the suit was barred by art. 106 of Sch. I. of the Indian Limitation Act, 1908, which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The respondent did not appeal. But on April 30 of the same year he launched a second suit against the present appellants, which is now in question before their Lordships.

In this suit, after setting out the proceedings in the previous suit and admitting that he had become disentitled to claim a general account and the payment to him of what might be found due and payable on the taking of a general account, he said that the sum of Rs.18,842 had been received by the appellants in various payments on various dates from debtors to the old firm, and he claimed his quarter share in this total sum. The appellants put in a written statement in which they denied that they had received any assets of the firm, said that if the accounts were to be taken the respondent would be found to be indebted to the firm, pleaded the Indian

Limitation Act, and that the suit was barred by res judicata and certain other defences. The suit was tried before Kumaraswami Sastriar J., who gave judgment on March 27, 1916, deciding the bulk of the issues in favour of the plaintiff, now respondent, and giving him a declaration that he was entitled to a quarter share of the amount claimed and ordering an account to be taken with a view to showing whether there was any set-off in respect of sums which might be due from the respondent to the appellants. By the schedule of the decree it appeared that approximately Rs.11,000 of the sum claimed had been received before the institution of the first suit, and the whole of the balance before the decree in the first suit. The learned judge held that though a general partnership account was barred by the Indian Limitation Act and by the decision in the first suit, there was nevertheless a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three; and that, therefore, the second suit had been brought in time. The learned judge came to this conclusion on the authority of certain cases decided in the High Court of Madras, following earlier decisions in the High Court of Bombay.

The present appellants appealed to the High Court in its appellate jurisdiction. The appeal came on before Sir John Wallis C.J. and Napier J. and was dismissed, the learned judges saying that they were not prepared to go behind three Madras decisions to the effect that a cause of action arises from the receipt after dissolution of partnership of assets by a former partner.

They observed that these decisions appeared to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action. Otherwise, as they said, it would be quite impossible to distinguish the decision in *Knox* v. *Gye.* (1) It is from this dismissal that the present appeal is brought.

Though in the opinion of the appellate judges the case of

---

(1) L. R. 5 H. L. 656.

Knox v. *Gye* (1), unless it can be distinguished, would destroy the case of the respondent, it so happens that it is upon a reading of certain passages in the speeches of the noble Lords who took part in that judgment that the series of cases in the Bombay and Madras High Courts, upon the authority of which judgment has been given for the respondent, proceed. It is, therefore, important to begin the consideration of the law with a careful analysis of that case.

Gye was lessee of the Covent Garden Theatre and for the purpose of the concern obtained in 1853 a considerable sum of money from one Thistlethwayte on terms of partnership. Thistlethwayte died in 1854, making Knox his executor. Knox in the second bill which he filed (which was the one that came under consideration in the House of Lords) contended that thereafter he and Gye continued the partnership. In 1854 negotiations were entered into with one Hughes for the temporary use of Her Majesty's Theatre, and a sum of 5000*l.* was paid to Hughes in advance for this purpose. Hughes did not carry out his share of the bargain. Gye sued him for the 5000*l.* and recovered judgment, but not succeeding in getting the money, he ultimately accepted, in 1862, the sum of 2500*l.* by way of compromise. In 1856 the Covent Garden Theatre was burnt down and Gye took the Lyceum Theatre. In October, 1864, Knox filed the bill against Gye, praying for accounts from the date of the original advance by Thistlethwayte, for the winding up of the alleged partnership between Gye and Thistlethwayte, that Knox might have his share of the sum advanced by Thistlethwayte, including a share of the money recovered or which ought to have been recovered from Hughes, and a share of the profits of the partnership. The answer set up by Gye in substance pleaded that Thistlethwayte's share was confined to the business of the old theatre, the whole capital of which was lost by the fire; that Knox was not entitled to any accounts; that his rights if any arose at law and not in equity; and that whichever way they arose, the statute of limitation was a good answer.

(1) L. R. 5 H. L. 656.

The Vice-Chancellor, Sir William Page Wood, made a decree in favour of Knox, being of opinion that the statute of limitation did not apply, either as regards the money received from Hughes, which he treated as an equitable claim enforceable in equity, or as regards the share of Thistlethwayte in the partnership, the statute being prevented from applying to that part of the claim, because of the fiduciary relation between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit.

On appeal the Lord Chancellor, Lord Chelmsford, reversed this decree. When the case came on for hearing before the House of Lords, the House was composed of Sir William Page Wood, now become Lord Hatherley and Lord Chancellor, Lord Chelmsford and Lords Westbury and Colonsay. At the close of the appellant's case the House was of opinion that the partnership never extended to the Lyceum business and counsel for the respondent were directed to confine themselves to the argument upon the statute of limitation. It was apparently considered that if the statute of limitation was to be applied, the right of Knox accrued in December, 1854, upon the death of Thistlethwayte, the partnership being dissolved by his death, and that the bill not being filed till 1864 was out of time; and with the possible exception of Lord Hatherley, the noble and learned Lords who composed the House held that the receipt of money from Hughes more than six years after the partnership was dissolved did not take the case out of the operation of the statute. If, therefore, the statute was to be applied it constituted a good defence. The matter then remaining for decision was whether this was a case where equity followed the law, and consequently the relief was barred. This was so held, Lord Hatherley dissenting, and the suit was accordingly dismissed.

Now it will be observed that the sum of 2500*l*. was received within the statutory period, and its receipt was the receipt by Gye of a partnership asset.

The case would seem, therefore, to be in point, and (the suit having been dismissed) adverse to the present respondent.

J. C.
1922
GOPALA CHETTY
v.
VIJAYARAGHAVACHARIAR.

But as the suit was one for a general account and not merely, or even by way of addition, to recover Knox's share of the sum received from Hughes, and as there are in the speeches of the noble and learned Lords some passages where a case like the present is put by way of hypothesis, the decision in *Knox* v. *Gye* (1) need not be taken for the purposes of the present judgment as laying down a final determination of the law on this point.

Nevertheless the observations in that case when carefully considered do not warrant the construction which has been put upon them by some of the Courts in India, but on the contrary warrant the conclusion to which independently of authority a little clear thinking leads.

Lord Hatherley, for the purposes of his observations, takes the case of a partnership dissolved by death and an account being taken "that everything which could be ascertained had been then ascertained and adjusted, that the account was complete, and that releases were given"—releases which as he says "could only go to the extent of the claim that then existed against the surviving partner." He assumes that in that case an asset for which no allowance has been made falls in and is received by the surviving ex-partner; and he holds that in such a case the executor of the deceased ex-partner could claim his share.

Lord Colonsay with a similar train of thought speaks of a sum of money "unexpectedly recovered."

Lord Chelmsford says: "It was said that upon payment of the debt by Hughes a new right to sue accrued to the appellant. But the right to sue for what? The answer must be, for an account. But that he was entitled to sue for all along, and the account must have included this very debt of Hughes, the receipt of which is supposed to have created a new right to an account." It is true that there is later on in his speech some rather vague language which may have led to his having been supposed to take the view that even when partnership accounts cannot be taken a suit may be brought for a specific item; but the whole tenor of his reasoning shows that he is contemplating the circumstances supposed by Lords Hatherley and Colonsay. Lord Westbury's language is striking—he is not contemplating this particular case, but discussing the effect of the statute of limitation. He says: "It will be asked whether the bar by the statute can be greater than a release between the parties? In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of the executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute, and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party." (1)

---

(1) L. R. 5 H. L. 656, 680, 687.

The rule of law then is the following: If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other.

The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of partnership, and both receiving and being in possession each can insist upon his proper share.

Lord Hatherley points out the most probable occasion when it would arise—namely, when one of the partners is dead and the debt has accrued at law to the surviving partner who thus becomes solely possessed of the former partnership item ; and he says that in such a case the executors of the deceased ex-partner would have a right to recover their testator's share from the ex-partner who has received the whole. It is not so certain that this particular case would arise in India by reason of the provisions of s. 45 of the Indian Contract Act, upon which section apparently different decisions have been given in the several High Courts in India : see Sir F. Pollock's work on the Indian Contract Act, 4th ed., p. 301. It is, however, possible to conceive of other cases in which this principle might have to be applied. A partner might contract really for the partnership, but apparently as sole principal and in that capacity be the sole recipient of a partnership item.

---

(1) L. R. 5 H. L. 656, 676.

At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.

If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken ; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that A. owed the partnership so much money and that it was anticipated that B. would hereafter receive a particular item which would operate substantially to balance the claim.

The principle above set forth being reasonably clear and intelligible, it remains for their Lordships to discuss certain decisions in the Indian Courts.

The first case on this matter was *Dayal Jairaj* v. *Khatav Ladha* (1), decided in the year 1875. The judgment in that

(1) (1875) 12 Bom. H. C. 97.

J. C.
1922
Gopala Chetty
v.
Vijayaraghavachariar

case rested upon other and incontrovertible grounds, but there were obiter dicta in the course of the judgment which no doubt would help the present respondent. These obiter dicta were relied upon by Latham J. in *Merwanji* v. *Rustomji* (1), decided in the year 1882. That decision is no doubt in point and in favour of the respondent; but it is to be observed that it was largely based upon the obiter dicta in the previous case.

The third Bombay case was *Rivett-Carnac* v. *Goculdas.* (2) Candy J. sitting as a single judge in the first Court criticised the previous Bombay decisions, but said that he was bound by them. Accordingly he held that though a claim for a general partnership account was barred by limitation a claim for a share of moneys received by the partnership within the period of limitation was not barred; that the plaintiff was entitled to recover Hemabai's and Goculdas' shares of the said money; and that the second defendant was entitled to set off against this his share of certain moneys received by the plaintiff as part of the assets of the said partnership. The High Court on appeal (2) held that the respondent's claim to an account of the partnership dealings was not barred by limitation, because under s. 17 of the Limitation Act (XV. of 1877) when a person, who, if living, would have a right to sue, has died, the period of limitation is to be computed from the time when there is a legal representative of such person capable of instituting the necessary suit, and gave the plaintiff a decree for the assets which he claimed. The case came on appeal to His Majesty in Council in 1898, and is reported as *Bhugwandas Mitharam* v. *Rivett-Carnac.* (3) This Board agreed with the decision of the High Court that the claim was not barred by the Limitation Act, but their Lordships thought that the decree given by the High Court was too wide, and directed an account to be taken of the partnership transactions. They made no observations on the particular point now under consideration, and the case may be left out of consideration except to the extent to which it embodies the criticisms of Candy J.

---

(1) I. L. R. 6 B. 628.

(2) (1895) I. L. R. 20 B. 15.

(3) (1898) L. R. 26 I. A. 32.

Their Lordships now turn to the Madras cases. In *Sokkanadha* v. *Sokkanadha* (1), decided on appeal by the High Court in 1904, the decision in *Merwanji* v. *Rustomji* (2) was followed as an authority, and reasons were superadded why in the opinion of the learned judges it was right. One passage may usefully be quoted: "Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure to some of the partners exclusively the benefit of realisation of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was realised. Of course, to allow such a claim to be maintained without the defendant being at liberty to go into the whole accounts and if possible defeat the plaintiff's claim by showing that the net balance is against the plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law."

With great deference this reasoning begs the question. How is it to be known that some of the partners would exclusively benefit by the realization of assets which come in after dissolution? To meet this objection the learned judges assume that accounts may be taken and that they have done enough for the ex-partner who is sued in saying that he may have the accounts taken. But if the policy of the law be that after the period of limitation no accounts shall be taken for the excellent reason that materials for taking such accounts may have disappeared, it is not legitimate to say to the person sued: "Either pay on the footing that accounts have been taken which we know have not been taken, and on the footing that all matters have been squared up between you and your partner when we have no knowledge that there has been any such squaring up, or submit to that taking of accounts against which the legislature has protected you."

(1) I. L. R. 28 M. 344. (2) I. L. R. 6 B. 628.

J. C.
1922
GOPALA CHETTY
v.
VIJAYARAGHAVACHARIAR.

Thiruvengada v. *Sadagopa* (1) also referred to in the judgment of the High Court in the case now under appeal, may be taken to be to the same effect.

On the other hand, the Chief Court of the Punjab has expressed its inability to follow these cases. (2)

Their Lordships have no information as to the matter having come before the High Court of Calcutta.

These decisions having been thus analysed appear to rest upon some obiter dicta which do not purport to express Indian law, but are the result of the construction which some learned judges have put upon the decision of the House of Lords in *Knox* v. *Gye* (3), and inferences drawn from that decision, and except for the reasoning upon which their Lordships have already commented in *Sokkanadha* v. *Sokkanadha* (4) to have no other basis. As their Lordships have already pointed out the obiter dicta in the Bombay High Court are founded upon a misapprehension of what took place in *Knox* v. *Gye.* (3)

The present case is a striking illustration of the mischief which might result from following the conclusion at which the learned judges in the appellate Court have arrived. The very items for which the respondent is now suing were actually items which would have come into the account on his claim against the appellants for a partnership account in the suit in which he failed.

As their Lordships have arrived at this conclusion, it is unnecessary to consider the further point raised on behalf of the appellants that the dismissal of the previous suit constituted the bar of res judicata.

Their Lordships will humbly recommend His Majesty that the appeal be allowed and that the suit be dismissed and that the appellants have their costs here and below.

Solicitor for appellants: *Douglas Grant.*
Solicitor for respondent: *John Josselyn.*

---

(1) [1910] I. L. R. 34 M. 112.
(2) 1910, P. R. 273, 298.
(3) L. R. 5 H. L. 656.
(4) I. L. R. 28 M. 344.

[PRIVY COUNCIL.]

J. C.*
1922
March 2.

MADRASSA ANJUMAN ISLAMIA OF KHOLWAD . . . . } APPELLANTS;

AND

MUNICIPAL COUNCIL OF JOHANNESBURG . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA.

South Africa (Transvaal)—Asiatics—Stands—Construction of Act—" Occupy " —Vrededorp Stands Act (No. 27 of 1907, Transvaal), s. 4 (b).

By s. 4 (*b*) of the Vrededorp Stands Act, 1907, the owner of a stand at Vrededorp (Johannesburg) " shall not permit any Asiatic, native or coloured person (other than the bona fide servant of a white person for the time being residing upon the stand) to reside on or occupy the stand, or any part thereof."

In the above enactment the words "to occupy," construed with regard to the purpose for which it is used as appearing in the Act, and the context, mean to be physically present for a substantial period of time, and do not mean to have legal possession in a technical sense. Consequently the enactment is infringed if the owner of a stand lets it to a limited company, whose Asiatic manager and employees, with the owner's knowledge and permission, carry on business there.

Judgment of the Supreme Court affirmed.

APPEAL by special leave from a judgment (August 8, 1919) of the Supreme Court of South Africa, Appellate Division, affirming a judgment (December 10, 1918) of the Supreme Court, Witwatersrand Local Division.

The appellants were a limited liability company incorporated in the Transvaal with the object of educating and maintaining Mahomedan children born at Kholwad, a town in the Bombay Presidency, India. The appeal arose out of a petition brought by the respondent council in the Witwatersrand Division to commit for contempt of Court certain Asiatics—namely, the chairman, vice-chairman and secretary (Dangor) of the appellant company. The circumstances in which the proceedings were brought appear from the judgment of the Judicial Committee.

---

* *Present :* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW, and LORD PHILLIMORE.

The determination of the appeal depended upon the construction and effect of s. 4 (*b*) of the Vrededorp Stands Act (No. 27 of 1907, Transvaal) the material terms of which appear in the headnote.

The petition was heard by De Villiers J.-P., who held that the occupation of the stand by Dangor and other Asiatics on behalf of Dangor, Ld., was in fraudem legis in the circumstances of the case. He accordingly did not find it necessary to decide any other question, but made an order declaring that a contempt of Court had been committed, and directing the appellants to pay the costs.

An appeal to the Appellate Division was heard by Sir William Solomon, acting Chief Justice, with Kotze and Mason JJ., and the order was affirmed. The learned judges did not decide whether the occupation of the stand by Dangor, Ld., was in fraudem legis or not; they held that the word "occupy" in s. 4 (*b*) of Act 27 of 1907 meant "habitual physical presence" on the land, and that in that view the company, Dangor, Ld., was incapable of occupying it.

The proceedings in South Africa are reported at S. A. L. R. [1919] A. D. 439.

1922. Jan. 23, 24. *Clauson K.C.* and *Dube* for the appellants. There was no infringement of s. 4 (*b*) of Act 27 of 1907. The land was in the occupation of Dangor, Ld. Occupation is not mere physical possession, it involves certain acts of control. It means the user of the land by an occupier for his own purposes, as distinct from the purposes of another. Dangor, Ld., although composed of Asiatics was not an "Asiatic" within the section, and could be an occupier even if it had no person upon the land: *Simmer and Jack Proprietary Mines* v. *O'Meara* (1); *Reynolds* v. *Oosthuizen* (2); *Abelman* v. *Lodenwijk* (3); *Dadoo, Ld.* v. *Krugersdorp Municipal Council.* (4) The last decision mentioned, decided since this case, negatives the contention that occupation by the company was in fraudem legis. [Reference was also made to the *Daimler Case.* (1)]

---

(1) S. A. L. R. [1916] W. L. D. 57.
(2) Ibid. 103.
(3) S. A. L. R. [1917] W. L. D. 123.
(4) S. A. L. R. [1920] A. D. 530.

Romer K.C. and *Draper* for the respondents. The section contemplates physical occupation by habitual presence on the stand. Both a person and his servant or employee can be in occupation within the section; but as Dangor, Ld., could not itself "occupy" the stand no difficulty of that kind arises. The meaning of "occupy" in the section depends upon the context, and upon a consideration of the apparent object of the statute: *Heydon's Case* (2); *River Wear Commissioners* v. *Adamson.* (3) Though the word in certain connections connotes legal possession, in other connections it has been construed in the manner contended for: e.g., *Dawson* v. *Midland Ry. Co.* (4) The object of the Act was to exclude the persons referred to from being habitually on the stands, and the words in brackets in s. 4 (*b*) strongly support that general view of the Act. [Reference was also made to *Manchester, Sheffield, &c., Ry.* v. *Wallis* (5) and (as to occupation by servants) to the cases cited in Halsbury's Laws of England, vol. xviii., § 773.]

Clauson K.C. in reply referred to *Tennant* v. *Smith.* (6)

March 2. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal by special leave from a judgment and order of the Supreme Court of South Africa (Appellate Division) which affirmed a judgment and order of the Supreme Court of South Africa (Witwatersrand Local Division).

The facts giving rise to the appeal are stated in the judgment of the acting Chief Justice as follows: "The appellants are members of the board of management of the Madrassa Islamia of Kholwad, a limited liability company incorporated in the Transvaal Province, which is registered as

---

(1) [1916] 2 A. C. 307.
(2) (1584) 3 Rep. 8.
(3) (1877) 2 App. Cas. 743, 763.
(4) (1872) L. R. 8 Ex. 8.
(5) (1854) 14 C. B. 213, 224.
(6) [1892] A. C. 150, 158.

J. C.
1922

Madrassa Anjuman Islamia v. Johannesburg Municipal Council.

the owner of Stand No. 320, Vrededorp. This stand is held subject to the conditions laid down in s. 4 (*b*) of the Vrededorp Stands Act, 1907, one of which is that 'the owner shall not permit any Asiatic, native or coloured person (other than the bona fide servant of a white person for the time being residing on the stand) to reside on or occupy the stand or any part thereof.' In breach of this condition the said company allowed one of the appellants, Dangor, to reside on and occupy the stand in question, having leased it to him for the purpose of carrying on a general business. An interdict was thereupon obtained restraining the company from allowing Dangor, or any other Asiatic or coloured person, to reside on or occupy the stand. (1) Three days after the making of the application in June, 1917, and before the interdict had been granted, Dangor converted his business into a limited liability company, with a registered capital of 5000*l.* divided into 5000 shares of the value of 1*l.* each. Dangor himself is the sole director and manager of the company, and holds the majority of the shares, the remaining shareholders being all Asiatics or coloured persons. After the interdict had been granted the appellants company gave a lease of the stand to Dangor, Ld., and Dangor continues to carry on business there as before, his employees being all Asiatics or coloured persons. In these circumstances an application was made to the Witwatersrand Local Division alleging that the appellants had been guilty of contempt of Court in failing to comply with the order interdicting them from allowing Dangor or any other Asiatic or coloured person to reside on or occupy the stand, and praying that they be punished by fine or committal, or in such other manner as to the Court might seem fit. Upon this application the Court declared the appellants to have committed contempt of Court, and ordered them to pay the costs of the application."

An appeal to the Appellate Division of the Supreme Court against the order last mentioned was dismissed, and thereupon the present appeal was brought.

The facts are not in dispute. On the one hand, it is not alleged that Dangor (who is an Asiatic) or any of his Asiatic or coloured subordinates reside on the stand; but, on the other hand, it is admitted that they carry on business there daily, Dangor being in sole management and control, and that this takes place with the knowledge and permission of the appellants. In these circumstances the question to be determined is whether the stand is "occupied" by Dangor, either alone or with his Asiatic or coloured servants, within the meaning of s. 4 (*b*) of the Vrededorp Stands Act, 1907.

---

(1) S. A. L. R. 1917 A. D. 718.

The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master: *Reg.* v. *Spurrell.* (1) At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of s. 68 of the Railway Clauses Act, 1845: *Dawson* v. *Midland Ry. Co.* (2); *Luscombe* v. *Great Western Ry. Co.* (3) Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used. In the present case it appears reasonably clear that the word is used in the second or more popular sense above described. The Vrededorp Stands Act, 1907, commences with a recital that the Government of the late South African Republic had by certain resolutions authorized the issue of stand licences on open stands on Government ground in the township of Vrededorp to indigent persons for the purpose of occupation by such persons, and proceeds to transfer the ground in question to the Municipal Council of Johannesburg and to entitle the registered holder of any stand to receive a grant of the freehold upon certain

(1) (1865) L. R. 1 Q. B. 72.
(2) L. R. 8 Ex. 8.
(3) (1899) L. R. 2 Q. B. 313.

conditions, of which one is the condition above referred to. There is also a provision (s. 13) which prohibits an Asiatic, coloured or native person (with the exception above mentioned) from residing on or occupying any stand. It appears by the judgments of the South African Courts that the object of these provisions was to prevent any Asiatic, native or coloured persons, for sanitary and other reasons, from dwelling or being habitually among the indigent white population to whom the stands were granted; and that the converse aspect of this policy appears in the provisions of other statutes which exclude Europeans from occupying, trading or settling in native or similar locations. However this may be, it is plain, from the fact that the prohibition is made to depend on race or colour, that it is the physical presence of the persons described, and not their right of possession in a legal or technical sense, which the statute has in view. To use the words of the acting Chief Justice, "what was objected to was the habitual physical presence of such persons on the stands"; and it is in this sense that the provision against "occupation" must be read. This conclusion is supported by the exception which is contained in the Act in favour of the bona fide servant of a white person for the time being residing on the stand, and also by the fact that the owner of a stand is prevented by another condition from subletting to any Asiatic, native or coloured person; for if "occupation" meant occupation as a tenant, this further condition would be superfluous.

This being the meaning of the condition in question and of the order founded upon it, it is plain that the order was infringed. Dangor, Ld., having no corporeal existence, could not occupy the stand in the above sense. It was occupied as well after as before the injunction by Dangor with his coloured staff. While Dangor was lessee he occupied it on his own behalf; when Dangor, Ld., became the lessee, Dangor continued to occupy it, but as manager and agent for Dangor, Ld., and on their behalf. The legal title to possession shifted, but the physical occupation was unchanged. There was, therefore, an infringement of the injunction, and the

J. C.
1922

MADRASSA ANJUMAN ISLAMIA v. JOHANNESBURG MUNICIPAL COUNCIL.

attempt to evade it was ineffective. Their Lordships concur on this point with the judgment of the Appellate Division.

Having regard to the above conclusion, it is unnecessary to consider the further question raised in the South African Courts—whether the conversion of Dangor into a limited company was ineffective according to the Roman-Dutch law, as being in fraudem legis. They, therefore, express no opinion upon that point.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*
Solicitors for respondents: *Taylor, Jelf & Thomas.*

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922 will be as follows:—

In the First Series,
[1922] 1 Ch. [1922] 2 Ch.

In the Second Series,
[1922] 1 K. B. [1922] 2 K. B. [1922] P.

In the Third Series,
[1922] 1 A. C. [1922] 2 A. C.

INDEX.

ACCIDENT - - - - 164, 170
See WORKMEN'S COMPENSATION.

ACQUISITION OF LAND—Local authority 27
See LAND.

—— Public Works - - - - 457
See CANADA.

" ALONGSIDE "—Cargo to be taken from 397
See SHIPPING.

APPORTIONMENT OF BLAME—Collision 68
See SHIPPING.

APPROBATING AND REPROBATING 240
See BANKER.

ARBITRATION—*Award — Construction of Submission — "All loss" — Finality of Award.*

Judgment of the Court of Appeal of Manitoba reversed. ATT.-GEN. FOR MANITOBA *v.* KELLY . - - - J. C. 268

2. —— *Award—Submission to Arbitration in England—Suit in India on Award—Defence of Irregularity in Arbitration—Judgment by Default in England—Suing on Judgment in India—Code of Civil Procedure (Act* V. *of* 1908), *s.* 13—*Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 11.

Judgment of the High Court of Madras reversed. OPPENHEIM (L.) & Co. *v.* MAHOMED HANEEF - - - - - - J. C. 482

AUSTRALIA - - - - - 240
See BANKER.

AWARD—Finality - - - - - 268
See ARBITRATION.

—— Irregularity - - - - - 482
See ARBITRATION.

BANKER — *Conversion of Drafts — Ratification— Approbating and Reprobating.*

Judgment of the Supreme Court of New South Wales reversed. UNION BANK OF AUSTRALIA, LD. *v.* MCCLINTOCK - J. C. 240

—— Receiving cheque for collection — " Holder " - - - - 1
See GAMING.

BETTING BY CHEQUE - - - 1
See GAMING.

BRANCH—Assessment to Income Tax in name of - - - - 417
See REVENUE.

BREACH—Mining regulations - 164, 170
See WORKMEN'S COMPENSATION.

BRITISH COLUMBIA.
See CANADA.

BRITISH NATIONALITY - - - 105
See CYPRUS.

BROKER—Commission—Charterparty 451
See SHIPPING.

CANADA.
See ARBITRATION and CONTRACT.

2. —— *Constitutional Law—Disallowance of Provincial Act—Accrued Title—Registration — Railway Lands — "Reasonable proof" —* 3 *&* 4 *Edw.* 7 (*B. C.*), *c.* 54, *s.* 3—7 *&* 8 *Edw.* 7 (*B. C.*), *c.* 71 — *British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 56, 90 ; *s.* 91, *head* 10.

Judgment of the Court of Appeal of British Columbia reversed. WILSON *v.* ESQUIMALT AND NANAIMO RY. CO. - - J. C. 202

3. —— *Legislative Power of Dominion—Combines and Fair Prices Act*, 1919 *— Property and Civil Rights — General*

CANADA—*continued.*
Legislative Power of Dominion—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91; *s.* 92, *head* 2. *In re* Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919 - - - **J. C. 191**

4. —— **(British Columbia)**—*Acquisition of Land—Public Works—Contract by Minister—Necessity for Order in Council—Public Works Act* (*R. S. B. C.*, 1911, *c.* 189), *ss.* 3, 37.
Judgment of the Court of Appeal affirmed. Mackay *v.* Att.-Gen. for British Columbia **J. C. 457**

5. —— —— *Succession Duty—Property within and outside Province—"Net value"—Succession Duty Act* (*R. S. B. C.*, 1911, *c.* 217), *ss.* 2, 7.
Judgment of the Supreme Court reversed. Royal Trust Co. *v.* Minister of Finance of British Columbia - - - **J. C. 87**

6. —— **(Quebec)**—*Gift—Shares in Company—Delivery of movable Property—Declaration of Trust—"Convey"—Civil Code of Lower Canada, arts.* 776, 981 (*a*).
Judgment of the Court of King's Bench affirmed. O'Meara *v.* Bennett - **J. C. 80**

7. —— —— *Legislative Authority of Province—Succession Duty—Movable Property outside Province—Direct Taxation within Province—Invalidity of Statute—Pleading—7 Edw.* 7 (*Queb.*), *c.* 14—4 *Geo.* 5 (*Queb.*), *cc.* 10, 11—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2.
Judgment of the Court of King's Bench reversed, and judgment of the Supreme Court of Canada affirmed. Burland *v.* The King. Alleyn *v.* Barthe - - **J. C. 215**

8. —— —— *Procedure—Right of Appeal—Circuit Court—Municipal Taxes—R. S. Q.*, 1909, *art.* 5755—10 *Geo.* 5 (*Queb.*), *c.* 79.
Judgment of the Court of King's Bench for the Province of Quebec affirmed. Canada Cement Co., Ld. *v.* La Ville de Montréal Est - - - - - - - **J. C. 249**

9. —— **(Yukon Territory)**—*Mining—Placer Mining Rights—Hydraulic Mining Lease—Regulations of* 1898, *No.* 3—*Yukon Placer Mining Act* (*R. S. Can.*, 1906, *c.* 64), *s.* 17.
Judgment of the Court of Appeal of British Columbia reversed. Seguin *v.* Boyle **J. C. 462**

CAPTURE—Enemy ships in neutral territorial waters - - - - 292
See Prize Court.

CARGO—Discharge - - - - - 397
See Shipping.

CARRIER—*Railway—Carriage of Goods—Special Contract—Owner's Risk—Loss of Goods—Wilful Misconduct—Inference from Conduct.*
Order of the Court of Appeal [1921] 2 K. B. 237 affirmed. Smith (H. C.), Ld. *v.* Great Western Ry. Co. - **H. L. (E.) 178**

CASES:—
—— *Balwant Rao* v. *Puran Mal* (1883) I. L. R. 6 All. 1.
Approved. Khaw Sim Tek *v.* Chuah Hooi Gnoh Neoh **J. C. 120**

—— *Blonde, The* - - - [1921] P. 155
Reversed - - - **J. C. 313**

—— *Brydone's Settlement, In re* [1903] 2 Ch. 84.
Approved and followed. Boyce *v.* Wasbrough - - **H. L. (E.) 425**

—— *Churchward* v. *The Queen* (1865) L. R. 1 Q. B. 173.
Applied. Mackay *v.* Attorney-General for British Columbia **J. C. 457**

—— *Commercial Cable Co.* v. *Government of Newfoundland* [1916] 2 A. C. 610.
Applied. Mackay *v.* Attorney-General for British Columbia **J. C. 457**

—— *Cooke* v. *Midland Great Western Ry. Co. of Ireland* [1909] A. C. 229
Applied. Glasgow Corporation *v.* Taylor - - **H. L. (Sc.) 44**

—— *Cotton* v. *The King* - [1914] A. C. 176
Followed. Burland *v.* The King; Alleyn *v.* Barthe - **J. C. 215**

—— *Curran* v. *Midland Great Western Ry. Co. of Ireland* [1896] 2 I. R. 183.
Distinguished. Smith (H. C.), Ld. *v.* Great Western Ry. Co. **H. L. (E.) 178**

—— *Dey* v. *Mayo* - [1920] 2 K. B. 346
Followed. Sutters *v.* Briggs **H. L. (E.) 1**

—— *Düsseldorf, The* - [1920] A. C. 176
Applied. The Pellworm **J. C. 292**

—— *Ellis's Settlement, In re* [1921] 1 Ch. 230
Affirmed - - - - **425**

—— *Emmins* v. *Bradford* (1880) 13 Ch. D. 493.
Approved and followed. Boyce *v.* Wasbrough - - **H. L. (E.) 425**

—— *Fife Coal Co.* v. *Sharp* [1921] 1 A. C. 329
Applied. Costello *v.* Addie (Robert) & Sons' Collieries, Ld. **H. L. (Sc.) 164**

—— *Forbes, In re* [1899] W. N. 6.
Overruled. Boyce *v.* Wasbrough **H. L. (E.) 425**

—— *Holman* v. *Wade* The Times, May 11, 1877.
Applied. Palgrave, Brown & Son, Ld. *v.* S.S. Turid (Owners of) **H. L. (E.) 397**

—— *Hugall* v. *M'Lean* (1885) 53 L. T. 94.
Considered. Murphy *v.* Hurly **H. L. (Ir) 369**

—— *Karamea, The* - - [1921] P. 76
Affirmed - - - **H. L. (E.) 68**

—— *Keymer* v. *Visvanathan Reddi* (1916) L. R. 44 I. A. 6.
Followed. Oppenheim (L.) & Co. *v.* Mahomed Haneef - **J. C. 482**

CASES—*continued.*

—— *Knox* v. *Gye* (1872) L. R. 5 H. L. 656
Observations in, explained. Gopala Chetty *v.* Vijayaraghavachariar **J. C. 488**

—— *Local Government Board* v. *Arlidge* [1915] A. C. 120.
Applied. Wilson *v.* Esquimalt and Nanaimo Ry. Co. - **J. C. 202**

—— *Merwanji Hormusji* v. *Rustomji Burjorji* (1882) I. L. R. 6 B. 628.
Disapproved. Gopala Chetty *v.* Vijayaraghavachariar **J. C. 488**

—— *Murphy* v. *Hurly* - [1921] 2 I. R. 335
Reversed - - - - **369**

—— *Osborne* v. *Morgan* (1888) 13 App. Cas. 227.
Followed. Seguin *v.* Boyle **J. C. 462**

—— *Pellworm, The* - - [1920] P. 347
Varied - - - - **J. C. 292**

—— *Rannveig, The* - - [1920] P. 177
Affirmed - - - **J. C. 97**

—— *Salter* v. *Cavanagh* (1838) 1 Dr. & Wal. 668.
Distinguished. Khaw Sim Tek *v.* Chuah Hooi Gnoh Neoh **J. C. 120**

—— *Smidth (F. L.) & Co.* v. *Greenwood* [1921] 3 K. B. 583.
Affirmed - - - - **417**

—— *Smith* v. *Russell (Archibald), Ld.* (1921) 58 S. L. R. 284.
Applied. Costello *v.* Addie (Robert) & Sons' Collieries, Ld. **H. L. (Sc.) 164**

—— *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1904) I. L. R. 28 M. 344.
Disapproved. Gopala Chetty *v.* Vijayaraghavachariar **J. C. 488**

—— *Stephens* v. *Wintringham* (1898) 3 Com. Cas. 169.
Overruled. Palgrave, Brown & Son, Ld. *v.* S.S. Turid (Owners of) - - - **H. L. (E.) 397**

—— *Thorburn* v. *Barnes* (1867) L. R. 2 C. P. 384.
Approved and followed. Oppenheim (L.) & Co. *v.* Mahomed Haneef - - - **J. C. 482**

—— *Turid, The* - - - [1921] P. 146
Affirmed - - - - **397**

—— *Valeria, The* - - [1921] A. C. 477
Applied. The Pellworm **J. C. 292**

—— *Waddell* v. *Coltness Iron Co.* (1912) 50 S. L. R. 29.
Applied. Costello *v.* Addie (Robert) & Sons' Collieries, Ld. **H. L. (Sc.) 164**

—— *Weston-super-Mare Urban District Council* v. *Butt (Henry) & Co.* [1919] 2 Ch. 1.
Affirmed - - - - **340**

CASES—*continued.*

—— *White* v. *Turnbull, Martin & Co.* (1898) 3 Com. Cas. 183.
Approved. French (L.) & Co. *v.* Leeston Shipping Co. **H. L. (E.) 451**

CEYLON—*Chena Lands — Presumption of Crown Ownership—Waste Lands Ordinance (No. 1 of 1897, Ceylon), s. 24—Decree in Partition Suit—Crown not bound—Ordinance No. 10 of 1863, s. 9.*
Judgment of the Supreme Court affirmed. Hameed *v.* Special Officer under the Waste Lands Ordinances - **J. C. 262**

CHARTERPARTY - - - **397, 451**
See Shipping.

CHEQUE GIVEN FOR RACING BET - **1**
See Gaming.

CHILD—Death from eating poisonous berries—Public park—Liability of custodians - - - - - **44**
See Negligence.

COLLISION - - - - - **68, 129**
See Shipping.

COLONIES.
See Australia, Canada, Ceylon, Cyprus, India, South Africa, and Straits Settlement.

COMMISSION—Shipbroker - - - **451**
See Shipping.

COMPENSATION — Assessment — Acquisition of land by local authority **27**
See Land.

CONDEMNATION—Neutral ship - - **97**
See Prize Court.

CONSTITUTIONAL LAW — Disallowance of Provincial Act - - - **202**
See Canada.

CONTRABAND—Carriage of - - **97**
See Prize Court.

CONTRACT—*Alleged Repugnancy — Building Agreement — Agreement to do Work in Consideration of certain Payments—Clause providing different Price.*
Judgment of the Supreme Court of Canada reversed. Forbes *v.* Git - - **J. C. 256**

CONTRIBUTORY NEGLIGENCE—Collision
See Shipping. **129**

CONVERSION—Draft - - - **240**
See Banker.

CROSSING RULES—Collision - - **68**
See Shipping.

CUSTOM OF PORT—Charterparty—Inconsistency - - - - **397**
See Shipping.

CYPRUS—*British Nationality — Orders in Council—Order interpreting earlier Proclamation — "Resident"—"Ordinarily resident."* Gout v. Cimitian - - J. C. 105

DAMAGE TO GOODS—Delay in placing goods in custody of marshal —Liability for damage - - 229
See Prize Court.

DECLARATION OF TRUST—Shares in company—Gift - - - - 80
See Canada.

DISCHARGE—Cargo - - - 397
See Shipping.

DISSOLUTION - - - - - 488
See Partnership.

DOMINION LEGISLATION—Ultra vires 191
See Canada.

ENEMY PROPERTY—Maritime prize, Subject of—Seizure of craft on land 235
See Prize Court.

ENEMY SHIP—Capture in neutral territorial waters - - - - 292
See Prize Court.

EXCESSIVE WEIGHT - - - 340
See Highway.

EXERCISE OF TRADE WITHIN UNITED KINGDOM—Income tax - 417
See Revenue.

EXPENSES OF MAINTENANCE—Merchant Shipping Acts—Termination of liability - - - - - 146
See Workmen's Compensation.

EXTRAORDINARY TRAFFIC - - 340
See Highway.

GAMING—*Cheque given for Racing Bet — Indorsement in Blank—Banker receiving for Collection — "Indorsee" or "holder" — Gaming Act*, 1835 (5 *&* 6 *Will.* 4, *c.* 41), *ss.* 1, 2.
Decision of the Court of Appeal affirmed. Sutters v. Briggs - - - H. L. (E.) 1

GIFT—Shares in company—Declaration of trust - - - - - 80
See Canada.

HAGUE CONVENTION - - - 313
See Prize Court.

HIGHWAY — *Repair — Extraordinary Traffic — Excessive Weight—Substitution of Mechanical Traction for Horse Traction — Highways and Locomotives (Amendment) Act*, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).
Decision of the Court of Appeal [1919] 2 Ch. 1 affirmed. Henry Butt & Co., Ld. v. Weston-super-Mare Urban District Council - - - - H. L. (E.) 340

ILLEGITIMATE CHILD—Devise to - 284
See Jersey.

IMPLIED CONDITION—Covenant to repair —Notice of want of repair - 369
See Landlord and Tenant.

INCOME TAX—Non-residents - - 417
See Revenue.

INCONSISTENCY—Of custom with terms of contract - - - - 397
See Shipping.

INDIA—Partnership—Dissolution - 488
See Partnership.

—— Suit on award made on a submission to arbitration in England - - 482
See Arbitration.

IRREGULARITY—Award - - - 482
See Arbitration.

JERSEY—*Testamentary Power — Immeubles acquêts—Devise to illegitimate Daughter — Custom of Jersey — Testaments d'Immeubles Règlement (Jersey)*, 1851, *arts.* 1, 3.
Judgment of the Royal Court reversed. Nicolle v. Nicolle - - - J. C. 284

JUDICIAL COMMITTEE—Appeals.
See Arbitration, Australia, Banker, Canada, Ceylon, Contract, Cyprus, Jersey, Limitation, Partnership, Prize Court and South Africa.

JURISDICTION - - - - 111
See Prize Court.

LAND—*Acquisition by Local Authority — Compensation — Assessment — Voluntary or Compulsory Purchase—Statute — Construction — General and Special Acts—Blackpool Improvement Act*, 1917 (7 *&* 8 *Geo.* 5, *c. lii.*), *s.* 70—*Acquisition of Land (Assessment of Compensation) Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 7, *sub-s.* 1.
Decision of the Court of Appeal affirmed. Blackpool Corporation v. Starr Estate Co., Ld. - - - - - H. L. (E.) 27

LANDLORD AND TENANT—*Sea Wall — Agreement by Landlord to keep in Repair—Action for Damages for Breach of Agreement — Implied Condition of Notice of want of Repair.*
Order of the Court of Appeal in Ireland [1921] 2 I. R. 335 reversed. Murphy v. Hurly - - - - H. L. (I.) 369

LEGISLATIVE POWERS—Dominion and Provincial - - - 191, 215
See Canada.

LIMITATION—Right to sue for an account
See Partnership. 488

2. —— *Will—Trust—Suit to avoid Trust and to recover on Intestacy—Period from which Limitation runs—Limitation of Suits Ordinance VI. of* 1896, *Str. Sett.*), *s.* 10; *Sch. II., art.* 99.
Judgment of the Supreme Court of the Straits Settlement reversed. Khaw Sim Tek v. Chuah Hooi Gnoh Neoh - J. C. 120

LOCAL AUTHORITY—Acquisition of land—Compensation - - - 27
See LAND.

MAINTENANCE—Seaman—Liability of shipowner under Merchant Shipping Acts - - - - - 146
See WORKMEN'S COMPENSATION.

MANITOBA.
See ARBITRATION.

MARITIME CONVENTIONS ACT, 1911 - 68
See SHIPPING.

MARITIME PRIZE—Subject of - - 235
See PRIZE COURT.

MARRIAGE SETTLEMENT—Trust for next of kin - - - - - 425
See SETTLEMENT.

MECHANICAL TRACTION — Extraordinary traffic - - - - - 340
See HIGHWAY.

MERCHANT SHIPPING ACTS—Seaman—Expenses of maintenance—Termination of liability - - - 146
See WORKMEN'S COMPENSATION.

MINER - - - - - 164, 170
See WORKMEN'S COMPENSATION.

MINING—Yukon Territory - - - 462
See CANADA.

MINING REGULATIONS—Breach — Shot firing - - - - 164, 170
See WORKMEN'S COMPENSATION.

NEGLIGENCE—*Public Park—Botanic Gardens—Poisonous Shrub—Child eating poisonous Berries—Liability of Proprietors and Custodians of Public Gardens.*
Interlocutor of the Second Division of the Court of Session in Scotland affirmed. GLASGOW CORPORATION *v.* TAYLOR **H. L. (Sc.) 44**

NEUTRAL GOVERNMENT—Rights of — Capture of enemy ship in neutral territorial waters - - - 292
See PRIZE COURT.

NEUTRAL SHIP—Condemnation - 97
See PRIZE COURT.

NEW SOUTH WALES.
See BANKER.

NEXT OF KIN—Trust for—" Without having been married " - - - 425
See SETTLEMENT.

NON-RESIDENTS—Liability to income tax 417
See REVENUE.

NOTICE—Of want of repair—Sea wall - 369
See LANDLORD AND TENANT.

ORDERS IN COUNCIL.
See RULES AND ORDERS.

OWNER'S RISK - - - - 178
See CARRIER.

PARTNERSHIP—*Limitation — Dissolution — Asset received by Partners—Right to sue for Share—Taking Accounts—Indian Limitation Act (XI. of* 1908), *Sch. I., art.* 106—*Indian Contract Act (IX. of* 1872), *s.* 265.
Judgment of the High Court of Madras reversed. GOPALA CHETTY *v.* VIJAYARAGHAVACHARIAR - - - - **J. C. 488**

POISONOUS SHRUB—Death of child from eating—Public park - - 44
See NEGLIGENCE.

PRIVY COUNCIL.
See JUDICIAL COMMITTEE.

PRIZE COURT—*Contraband Goods—Neutral Ship—Construction of International Agreement—Enemy Base of Supply—Condemnation of Ship—Carriage of Contraband—Belief that Trade authorized.*
Judgment of the Prize Court affirmed. THE RANNVEIG - - - - **J. C. 97**

2. —— *Damage to Goods—Reprisals Order in Council of March* 11, 1915—*Delay in placing Goods in Custody of Marshal—Liability for Damage.*
Judgment of the Prize Court affirmed. THE NEW SWEDEN - - - **J. C. 229**

3. —— *Detention of German Ships in British Ports—Requisition—Owners' Rights to release—Applicability of Hague Convention—German Misconduct of War—Effect of Peace Treaty—Treaty of Versailles, Part VIII., annex* 3, *art.* 1 ; *Pt. X., art.* 297—*Hague Convention No. VI., arts.* 1, 2, 6.
Judgment of the Prize Court [1921] P. 155 reversed.
Further advised, on petitions, that certain German ships of 1600 tons gross and upwards detained as above should be released to the Crown the orders for detention being discharged. THE BLONDE - - **J. C. 313**

4. —— *Enemy Property—Subjects of Maritime Prize—Lighters and Craft seized on Land.*
Judgment of the Prize Court affirmed. THE ANICHAB - - - - **J. C. 235**

5. —— *Enemy Ships—Capture in Neutral Territorial Waters—Test of Capture—Hauling down Flag—Requisition Order—Requisitioned Ship sunk by Enemy Action — Appraised Value—Rights of Neutral Government—Prize Court Rules,* 1914, *Order xxix.—Treaty of Versailles, Pt. VIII., annex III., arts.* 1, 440.
Judgments of the Prize Court [1920] P. 347 varied. THE PELLWORM **J. C. 292**

6. —— *Jurisdiction — Incidental Matters — Absence of Jurisdiction after Release — Third-party Procedure.*
Judgment of the Prize Court reversed. EGYPTIAN BONDED WAREHOUSES CO., LD. *v.* YEYASU GOSHI KAISHA - - **J. C. 111**

PROCEDURE—Right of Appeal from Circuit Court, Quebec - - 249
See CANADA.

PROVINCIAL LEGISLATION — Ultra vires 215
See CANADA.

PUBLIC PARK—Custodians — Liability for growing poisonous shrubs - 44
See Negligence.

PUBLIC WORKS—Acquisition of land - 457
See Canada.

QUEBEC.
See Canada.

RAILWAY—Carriage of goods - - 178
See Carrier.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA—Breach — Collision - - - - - 68
See Shipping.

RELEASE — German ships detained in British ports - - - 313
See Prize Court.

REPAIR—Sea wall - - - - 369
See Landlord and Tenant.

REPUGNANCY.
See Contract and Shipping.

REVENUE—*Income Tax—Trade exercised within United Kingdom—Assessment of non-resident Persons in Name of Branch—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *Sch. D—Finance* (*No.* 2) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 31.
Decision of the Court of Appeal [1921] 3 K. B. 583 affirmed. Greenwood *v.* Smidth (F. L.) & Co. - - **H. L. (E.) 417**

RULES AND ORDERS :—
—— *Explosives in Coal Mines Order of September* 1, 1906, *para.* 3 (*a*): Coltness Iron Co., Ld. *v.* Baillie **H. L. (Sc.) 170**
Costello *v.* Addie (Robert) & Sons' Collieries, Ld. **H. L. (Sc.) 164**
—— *Mining Regulations for the Yukon Territory*, 1898, *No.* 3 Seguin *v.* Boyle - - - - **J. C. 462**
—— *Orders in Council of November* 5 *and November* 27, 1917: Gout *v.* Cimitian - - - **J. C. 105**
—— *Prize Court Rules*, 1914, *Order* xxix.: The Pellworm - - **J. C. 292**
—— *Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, 28: S.S. Haugland (Owners of) *v.* S.S. Karamea (Owners of) **H. L. (E.) 68**
—— *Reprisals Order in Council of March* 11, 1915: The New Sweden **J. C. 229**
—— *Testaments d'Immeubles Règlement* (*Jersey*), 1851, *arts.* 1, 3. Nicolle *v.* Nicolle - - **J. C. 284**

SEA WALL—Covenant to repair - 369
See Landlord and Tenant.

SEAMAN - - - - - - - 146
See Workmen's Compensation.

SETTLEMENT — *Construction* — *Second Marriage of Wife—Wife's Fund—Ultimate Trust for Wife's statutory Next of Kin had she died Intestate and "without having been married"—Claim of Child of former Marriage.*
Decision of the Court of Appeal [1921] 1 Ch. 230 affirmed. Boyce *v.* Wasbrough **H. L. (E.) 425**

SHARES IN COMPANY—Gift—Declaration of trust - - - - - 80
See Canada.

SHIPBROKER—Commission - - 451
See Shipping.

SHIPPING — *Charterparty* — *Discharge of Cargo—Cargo to be taken from alongside at Charterers' Expense—Custom of Port—Inconsistency.*
Decision of the Court of Appeal [1921] P. 146 affirmed. Palgrave, Brown & Son, Ld. *v.* S.S. Turid (Owners of) - **H. L. (E.) 397**

2. —— *Charterparty* — *Shipbroker—Commission* — *Time Charter* — *Sale of Ship to Charterer during Charter Period—Right of Broker to Commission for whole Charter Period.* L. French & Co., Ld. *v.* Leeston Shipping Co., Ld. - - **H. L. (E.) 451**

3. —— *Collision—Contributory Negligence—Convoy—Omission to sound appropriate Helm Signal on altering Course—Maritime Conventions Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1 (*a*), (*b*).
Decision of the Court of Appeal holding the *R.* alone to blame reversed. Admiralty Commissioners *v.* S.S. Volute (Owners of) **H. L. (E.) 129**

4. —— *Collision* — *Crossing Rules* — *Apportionment of Blame—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 19, 21, 28—*Breach whether contributing to Collision—Maritime Conventions Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1, *sub-s.* 1; *s.* 4, *sub-s.* 1.
Decision of the Court of Appeal [1921] P. 76 affirmed. S.S. Haugland (Owners of) *v.* S.S. Karamea (Owners of) - **H. L. (E.) 68**

SHOT FIRER - - - - - 164, 170
See Workmen's Compensation.

SOUTH AFRICA (Transvaal) —*Asiatics*—*Stands—Construction of Act—"Occupy"—Vrededorp Stands Act* (*No.* 27 *of* 1907, *Transvaal*), *s.* 4 (*b*).
Judgment of the Supreme Court affirmed. Madrassa Anjuman Islamia of Kholwad *v.* Municipal Corporation of Johannesburg - - - - - - **J. C. 500**

STATUTE — Construction — General and Special Acts - - - - 27
See Land.

STATUTES :—
I. Imperial.
1835.
5 & 6 Will. 4, c. 41 (Gaming), ss. 1, 2: Sutters *v.* Briggs - **H. L. (E.) 1**

STATUTES—*continued.*

1842.

5 & 6 Vict. c. 35 (Income Tax), s. 41: Greenwood *v.* Smidth (F. L.) & Co. **H. L. (E.) 417**

1853.

16 & 17 Vict. c. 34 (Income Tax), Sch. D: Greenwood *v.* Smidth (F. L.) & Co. **H. L. (E.) 417**

1867.

30 & 31 Vict. c. 3 (British North America), ss. 56, 90, 91: Wilson *v.* Esquimalt and Nanaimo Ry. Co. **J. C. 202**

—— —— ss. 91, 92: *In re* Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919 **J. C. 191**

—— —— s. 92: Burland *v.* The King. Alleyn *v.* Barthe - **J. C. 215**

1878.

41 & 42 Vict. c. 77 (Highways and Locomotives), s. 23: Butt (Henry) & Co. *v.* Weston-super-Mare Urban District Council - **H. L. (E.) 340**

1889.

52 & 53 Vict. c. 49 (Arbitration), s. 11: L. Oppenheim & Co. *v.* Mahomed Haneef - - - **J. C. 482**

1898.

61 & 62 Vict. c. 29 (Locomotives), s. 12, sub-s. 1 (*b*): Butt (Henry) & Co. *v.* Weston-super-Mare Urban District Council - **H. L. (E.) 340**

1906.

6 Edw. 7, c. 48 (Merchant Shipping), s. 34: Anchor Line (Henderson Bros.), Ld. *v.* Mohad - **H. L. (Sc.) 146**

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1: Coltness Iron Co., Ld. *v.* Baillie - **H. L. (Sc.) 170**

Costello *v.* Addie (Robert) & Sons' Collieries, Ld. **H. L. (Sc.) 164**

—— —— s. 7: Anchor Line (Henderson Bros.), Ld. *v.* Mohad **H. L. (Sc.) 146**

1911.

1 & 2 Geo. 5, c. 57 (Maritime Conventions), s. 1: Admiralty Commrs. *v.* S.S. Volute (Owners of) **H. L. (E.) 129**

—— —— s. 1, sub-s. 1; s. 4, sub-s. 1: S.S. Haugland (Owners of) *v.* S.S. Karamea (Owners of) **H. L. (E.) 68**

1915.

5 & 6 Geo. 5, c. 89 (Finance), s. 31: Greenwood *v.* Smidth (F. L.) & Co. **H. L. (E.) 417**

1917.

7 & 8 Geo. 5, c. lii. (Blackpool Improvement), s. 70: Blackpool Corporation *v.* Starr Estate Co. **H. L. (E.) 27**

STATUTES—*continued.*

1919.

9 & 10 Geo. 5, c. 57 (Acquisition of Land), s. 1, sub-s. 1; s. 7, sub-s. 1. Blackpool Corporation *v.* Starr Estate Co. - - - - **H. L. (E.) 27**

II. Colonies.

Canada.

Civil Code of Lower Canada, arts. 776, 981 (*a*): O'Meara *v.* Bennett **J. C. 80**

1904.

3 & 4 Edw. 7 (B. C.), c. 54, ss. 3–7: Wilson *v.* Esquimalt and Nanaimo Ry. Co. - - - - **J. C. 202**

1906.

R. S. Can., 1906, c. 64 (Yukon Placer Mining Act), s. 17: Seguin *v.* Boyle - - - **J. C. 462**

1907.

7 Edw. 7 (Queb.), c. 14: Burland *v.* The King. Alleyn *v.* Barthe **J. C. 215**

1908.

8 Edw. 7 (B.C.), c. 71: Wilson *v.* Esquimalt and Nanaimo Ry. Co. **J. C. 202**

1909.

R. S. Q., 1909 (Cities' and Towns' Act), art. 5755: Canada Cement Co., Ld. *v.* La Ville de Montréal Est **J. C. 249**

1911.

R. S. B. C., 1911, c. 189 (Public Works), ss. 3, 37: Mackay *v.* Attorney-General for British Columbia **J. C. 457**

R. S. B. C. 1911, c. 217 (Succession Duty), ss. 2, 7: Royal Trust Co. *v.* Minister of Finance of British Columbia - - - **J. C. 87**

1914.

4 Geo. 5 (Queb.), cc. 10, 11: Burland *v.* The King. Alleyn *v.* Barthe **J. C. 215**

1919.

9 & 10 Geo. 5, Dom., c. 37 (Board of Commerce): *In re* Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919 **J. C. 191**

9 & 10 Geo. 5, Dom., c. 45 (Combines and Fair Prices): *In re* Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919: **J. C. 191**

1920.

10 Geo. 5 (Queb.), c. 79: Canada Cement Co., Ld. *v.* La Ville de Montréal Est - - - - **J. C. 249**

Ceylon.

1863.

Ordinance No. 10 of 1863, s. 9: Hameed *v.* Special Officer under the Waste Lands Ordinances **J. C. 262**

STATUTES—*continued.*

1897.

No. 1 of 1897, Ceylon (Waste Lands Ordinance), s. 24: Hameed *v.* Special Officer under the Waste Lands Ordinances - - **J. C. 262**

India.

1872.

IX. of 1872 (Indian Contract Act), s. 265: Gopala Chetty *v.* Vijayaraghavachariar - - - **J. C. 488**

1908.

Act 5 of 1908 (Code of Civil Procedure), s. 13: L. Oppenheim & Co. *v.* Mahomed Haneef - **J. C. 482**

XI. of 1908 (Indian Limitation Act), Sch. I., art. 106: Gopala Chetty *v.* Vijayaraghavachariar **J. C. 488**

South Africa.

1907.

No. 27 of 1907, Transvaal (Vrededorp Stands Act), s. 4 (*b*): Madrassa Anjuman Islamia of Kholwad *v.* Municipal Corporation of Johannesburg - - **J. C. 500**

Straits Settlements.

1896.

Limitation of Suits Ordinance VI. of 1896, Str. Sett., s. 10; Sch. II., art. 99: Khaw Sim Tek *v.* Chuah Hooi Gnoh Neoh - - - **J. C. 120**

STRAITS SETTLEMENTS - - - 120
See Limitation.

SUCCESSION DUTY - - - - 87
See Canada.

TESTAMENTARY POWER—Devise to illegitimate child - - - 284
See Jersey.

THIRD PARTY PROCEDURE - - 111
See Prize Court.

TRADE—Exercise of, in United Kingdom—Income Tax - - - - 417
See Revenue.

TREATY OF VERSAILLES - 292, 313
See Prize Court.

TRUST—Action for avoiding - - 120
See Limitation.

ULTRA VIRES—Dominion and Provincial legislation - - - 191, 215
See Canada.

VERSAILLES—Treaty of - - 292, 313
See Prize Court.

WANT OF REPAIR—Notice of—Landlord's covenant to repair - - 369
See Landlord and Tenant.

WILFUL MISCONDUCT - - - 178
See Carrier.

"WITHOUT HAVING BEEN MARRIED"
See Settlement. 425

WORDS—"All loss": Att.-Gen. for Manitoba *v.* Kelly - - **J. C. 268**

—— "Alongside": Palgrave, Brown & Son *v.* S.S. Turid (Owners of) **H. L. (E.) 397**

—— "Convey": O'Meara *v.* Bennett **J. C. 80**

—— "Holder": Sutter *v.* Briggs **H. L. (E.) 1**

—— "Indorsee": Sutter *v.* Briggs **H. L. (E.) 1**

—— "Net value": Royal Trust Co. *v.* Minister of Finance of British Columbia - - - **J. C. 87**

—— "Ordinarily resident": Gout *v.* Cimitian - - - - **J. C. 105**

—— "Reasonable proof": Wilson *v.* Esquimalt and Nanaimo Ry. Co. **J. C. 202**

—— "Resident": Gout *v.* Cimitian **J. C. 105**

—— "Without having been married": Boyce *v.* Wasbrough **H. L. (E.) 425**

WORKMEN'S COMPENSATION—*Accident arising out of Employment—Miner — Shot Firing — Misfire—Breach of Statutory Regulations— Added Peril—Explosives in Coal Mines Order of September* 1, 1913, *para.* 3 (*a*) —*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Decision of the Second Division of the Court of Session in Scotland affirmed. Coltness Iron Co., Ld. *v.* Baillie - **H. L. (Sc.) 170**

2. —— *Accident arising out of Employment — Miner — Shot Firing — Misfire — Breach of Statutory Regulation —Explosives in Coal Mines Order of September* 1, 1913, *para.* 3 (*a*)—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

Decision of the Second Division of the Court of Session in Scotland affirmed. Costello *v.* Addie (Robert) & Sons' Collieries, Ld. - - **H. L. (Sc.) 164**

3. —— *Seaman — Liability of Shipowner for Expenses of Maintenance under Merchant Shipping Acts—Date of Commencement of Compensation—Merchant Shipping Act,* 1906 (6 *Edw.* 7, *c.* 48), *s.* 34, *sub-s.* 1—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*).

Decision of the Second Division of the Court of Session in Scotland affirmed. Anchor Line (Henderson Bros.), Ld. *v.* Mohad - - - - **H. L. (Sc.) 146**

YUKON TERRITORY.
See Canada.

W. SPEAIGHT & SONS, LTD., PRINTERS, 98–99, FETTER LANE, LONDON, E.C. 4.

BIBL. LOND. UNIV.

LONDON UNIV.

THE
LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

APPEAL CASES.

1922. A.C.

(p. 1 to p. 128).

PART I.—FEBRUARY 1.

TABLE OF CASES.

APPEAL CASES.

		PAGE
Blackpool Corporation *v.* Starr Estate Co.	H. L. (E.)	27
Egyptian Bonded Warehouses Co. *v.* Yeyasu Goshi Kaisha	P. C.	111
Glasgow Corporation *v.* Taylor	H. L. (Sc.)	44
Gout *v.* Cimitian	P. C.	105
Haugland (Owners of S.S.) *v.* Karamea (Owners of S.S.)	H. L. (E.)	68
Khaw Sim Tek *v.* Chuah Hooi Gnoh Neoh	(P. C.)	120
O'Meara *v.* Bennett	(P. C.)	80
Rannveig, The	(P. C.)	97
Royal Trust Co. *v.* Minister of Finance	(P. C.)	87
Sutters *v.* Briggs	H. L. (E.)	1

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

"The Law Reports, 1922," for February, consist of—

Chancery Division	Part II.
King's Bench and Probate Divisions	Part II.
Appeal Cases	Part I.

Editor—Rt. Hon. Sir FREDERICK POLLOCK, Bart., K.C.

Assistant Editor of Current Digest—J. S. HENDERSON, *Barrister-at-Law.*

Assistant Editors of Weekly Notes W. IVIMEY COOK, R. F. STUBBING, *Barristers-at-Law.*

Reporters:

House of Lords	H. B. Hemming,	*Barrister-at-Law.*
Privy Council	A. M. Talbot,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	G. A. Streeten, W. Ivimey Cook,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	W. H. Griffith, J. F. Clerk,	*Barristers-at-Law.*
Mr. Justice Eve	George Macan,	*Barristers-at-Law.*
and Mr. Justice Peterson ..	R. Morrison,	
Mr. Justice Sargant ..	H. C. Garsia,	*Barristers-at-Law.*
and Mr. Justice Russell ..	P. J. Boland,	
Mr. Justice Astbury ..	G. R. Alston,	*Barristers-at-Law.*
and Mr. Justice P. O. Lawrence	H. C. Hawkins,	
	J. B. B. MacMahon,	*Barrister-at-Law.*
King's Bench Court of Criminal Appeal Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases	J. S. Henderson, R. F. Stubbing, J. Ritchie, W. L. L. Bell, F. Porter Fausset, G. H. Knott.	*Barristers-at-Law.*
Probate and Divorce ..	J. R. Brooke,	*Barrister-at-Law.*
Admiralty Cases	E. C. Trehern,	*Barrister-at-Law.*
Ecclesiastical Cases ..	C. F. Jemmett,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

THE LAW REPORTS, 1922 (Unbound).

	£	s.	d.
ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest)	7	7	0
COMPLETE CURRENT DIGEST, 1922 (a Digest, issued quarterly, of all reported cases) (unbound)	1	1	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	4	4	0
DECENNIAL DIGEST, 1891-1900 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1901-1910 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth)	4	4	0
WEEKLY NOTES, 1922 (unbound)	1	10	0
INDIAN APPEALS, 1922 (unbound)	1	5	0
INDIAN APPEALS. Digest, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS.
1921 (9 Vols.).

Cloth	6s. 9d.	per Vol.
Buckram	9s. 3d.	„
Half-Calf	10s. 9d.	„
Half-Morocco	11s. 6d.	„
Calf	15s. 0d.	„

WEEKLY NOTES.
1921 (1 Vol.).

	Notes of Cases.	Notes of Cases and Miscellaneous.
Cloth	7s. 3d.	7s. 9d.
Half-Calf	11s. 6d.	12s. 3d.
Half-Morocco	12s. 9d.	13s. 3d.
Calf	16s. 6d.	17s. 9d.

When the Subscriber's address is more than four miles from the Law Courts a charge of 5s. 6d. is made for cost of carriage of bound Volumes for the Year.

Unbound parts should be sent, carriage paid, to 30, Montague Street, London, W.C. 1, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.

The back years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes*, 1891-1914, the *Indian Appeals*, 1889-1893, and the *Law Reports*, 1918, are out of print.

All sums payable to the Council must be prepaid, and (unless a Bankers' Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed “ & Co., not negotiable.” *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C. 1.

HALSBURY'S

LAWS OF

ENGLAND.

REPRINT
EDITION.

Publishers' Note.

The Laws of England is the most eminent and most frequently consulted Legal Work in the British Empire. It occupies the Leading Place in the modern Lawyer's Library. Its merits are so well-known, and its utility so fully realised that detailed description is unnecessary.

The reprint edition is being rapidly taken up, and early application is essential to secure the benefit of the present advantageous rates.

Full Prospectus, &c.,
on application.

BUTTERWORTH & CO.,
BELL YARD, TEMPLE BAR, LONDON,
W.C.2.

UL - 7 APR 1976